CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF LOUISIANA.

EASTERN DISTRICT, JANUARY TERM, 1820.

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MEEKER'S ASS. vs. *WILLIAMSON & AL'S SY.*

MEEKER'S ASS. vs. WILLIAMSON & AL.'S SYNDICS

APPEAL from the court of the first district.

On a rule to shew cause, why syndics should not be ordered to pay a sum claimed, they may demand that the facts they suggest in opposition to the claim, be tried by jury.

MATHEWS, J. delivered the opinion of the court. This is a case in which the plaintiffs and appellees claim a priviledge on the proceeds of certain property, which belonged to the insolvents, and has been sold by the defendants and appellants.

The claim is made, in a summary way, on a motion for a rule on the defendants, to shew cause why they should not be ordered to pay to the plaintiffs the money arising from the sale of the property: which rule having been made absolute by the decision of the district court, the present appeal was taken.

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On the part of the defendants and appellants, it is contended that this mode of proceeding is irregular and not warranted by law; that it is an original suit and ought to have been instituted by petition. In a case like the present, it is clear, from the records of our courts, that both modes (by motion and petition) have been indiscriminately resorted to. As proceedings in court, which may be necessary to a just distribution of the insolvent's estate, are incidental to the original action by which he makes a surrender of his property, we are of opinion that the ranks and priviledges of the claims of creditors may be legally settled, without the formality and delay of an original suit by petition. But, if in the more speedy mode of proceeding by rule, facts be suggested by either party, and a jury be prayed for to try them, it ought to be allowed.

In this case, the defendant and appellants, in shewing cause against the rule obtained against them, answered by suggesting facts and praying a jury to try them.

We think that the district court erred, in refusing a jury to be summoned to decide the facts of the case.

It is, therefore, ordered, adjudged and decreed that the judgment of the district court be annul-

led, avoided, and reversed; and it is further ordered, adjudged and decreed that the cause be sent back to be again tried, with directions to the district judge to order a jury to be summoned, as prayed for by the defendants and appellants, and that the costs of this appeal be paid by the plaintiffs and appellees.

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Mumford's Adm'r. vs. Williamson & al., Executrix.

Smith for the plaintiffs. *Livingston* for the defendants.

CANFIELD & AL. vs. *NOTROBE.*

A note, payable in merchandise, cannot be offered in payment of a cash debt.

APPEAL from the court of the first district.

DERBIGNY, J. delivered the opinion of the court. The defendant and appellant bought from the plaintiffs and appellees a quantity of goods, which were sold to him at cash prices. On the next day he tendered to them in payment, their promissory note, payable in merchandize out of their store, at fair market prices, to the order of J. Brandegee, and by him endorsed in blank.

Is this a payment of his debt in money? We think not. The contract between the parties was a sale of goods for cash, the note of the plaintiffs and appellees is an obligation to deliver merchandize.

It is by no means clear that the note could

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be tendered in payment of a cash debt, even if it had been payable in merchandise at cash price: but it is, at least very plain that it cannot, when payable in merchandise at some other than a cash price. A witness, heard in this case, says that the plaintiffs and appellees consider the difference to be equal to twenty per cent. Whether it is or not is of no consequence: any difference is enough.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court, for the plaintiffs and appellees, be affirmed with costs.

Hoffman for the plaintiffs, *Morse* for the defendants.

THURET & AL. vs. JENKINS & AL.

If a ship be sold in New-York, while she is at sea, she cannot, on her arrival at New Orleans, be attached for a debt of the vendor.

APPEAL from the court of the first district.

The plaintiffs instituted this suit by attachment, and the undivided half of the ship Favorite was levied upon. Philotas Havens intervened, claiming the said half, as his property, under a bill of sale of the defendants. There was judgment for him, and the plaintiffs appealed.

The statement of facts admits the plaintiffs' claim, the execution of the bill of sale, and the insolvent circumstances of the defendants at the time. The date is of the 17th of June, 1831, and the consideration of it was a debt which accrued to the claimant, by the payment of several notes of the defendant, endorsed by him.

The attachment was levied on the 14th of July following.

The original bill of sale was sent to New-Orleans and lodged in the custom house on the 16th.

The claimants' agent, in New-Orleans, gave notice to that of the plaintiffs of the transfer of the defendants' interest in the ship to the claimant, immediately on receipt of the bill of sale.

Livermore, for the plaintiffs. The assignment to the claimant was made, by the defendants, after their insolvency. It was made with the intent to prefer a favourite creditor, and it was not perfected by delivery. According to all the decisions of this court the property in this ship remained in the defendants at the time our attachment was laid.

In the case of *Durnford* vs. *Syndics of Brooks*, 3 *Martin* 222, the principle is established, that the contract of sale does not transfer the property of the thing sold; but that such transfer is

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the effect of the delivery. And the present case is stronger than that of a sale, being rather a *dation en payement* than a sale. In the cases cited the court recognize the doctrine that delivery is of the very essence of this contract. *Norris* vs. *Mumford*, 4 *Martin*, 20, is also expressly in point. In that case the goods attached were in New-Orleans, and all the parties were citizens of New-York; so that an actual delivery at the time of sale was impossible. It was determined, that as no actual delivery took place before the attachment was laid, the attaching creditor should hold the goods.

The same point was again determined in *Ramsay* vs. *Stevenson*, 5 *Martin*, 23, after full discussion. In that case the insolvent, the assignee, and the attaching creditor, were all citizens of Maryland, and it was argued, with great zeal, that by the laws of that state the transfer was complete, and the property vested in the assignee. But the court decided, that a delivery was essential to transfer the property, and supported the attachment. In the case of *Fisk* vs. *Chandler*, 7 *Martin*, 24, the same judgment was rendered; and in that case all the parties were citizens of Massachusetts.

In the present case, the district judge decided in favour of the claimant, because he considered

that there was a distinction between the sale of an entire ship and the sale of a part, and that, in the case of a part owner selling his share, no delivery was required, because it was impossible. With great deference I conceive the distinction is not sound. It is true, that upon the construction of the statute of Elizabeth, against fraudulent conveyances, a distinction has been made by the courts in England between cases where the grantor was enabled to give possession but retained it, and cases where delivery was impossible. When the property conveyed was abroad, there seems to have been an impression that the conveyance would be good against creditors upon this principle. But all the cases, in which such doctrines were supposed to be maintained, were brought before this court upon the argument of *Stevenson* vs. *Ramsay*, and it was solemnly decided that no such doctrine could be here admitted. The judgments of this court do not proceed upon the ground of fraud, but upon the principle of law that delivery is essential to the perfection of a sale. In cases where property is abroad, an actual delivery, at the time of sale, is impossible. It is no more impossible in the case of the sale of a part than of the whole. The written evidences of title may be given in one case, as easily as

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in the other, and possession may be taken of the part, in the same time and in the same manner as of the whole. The necessity of taking actual possession seems to have been well understood by these parties. For the bill of sale was sent on to New-Orleans, by the claimant, to his agent Benjamin Story; and if it had arrived two days sooner, the sale would have been effected before our attachment was laid. But the creditor was more vigilant, and is to be preferred.

Morse, for the claimant. The principle decided in the case of *Durnford* vs. *Brookes' syndics*, seem, to have been considered as the foundation of the decisions in the subsequent ones. It was there the opinion of the court, relying on the doctrine laid down in *Pothier, Traité du contrat de Vente, part* 3, *chap.* 1, *art.* 2, (and the only authority cited in the argument of the cause,) *that delivery only, in a contract of sale, transfers property.* This decision, however hard, as it may have borne upon the plaintiff, who was admitted to have been a purchaser in good faith, was nevertheless within the letter and spirit of the civil law. Yet, from a comparison of the facts in that case with the present, I am satisfied that the acutest mind cannot

trace the slightest resemblance between the two cases.

In the former, the contracting parties resided, and the sale was executed in the state of Louisiana, a country governed by the civil law. In the present, the parties reside and the sale was executed in the state of New-York, where it is admitted the common law prevails. Until the counsel for the plaintiffs can reconcile these differences, he will surely cease to press the case of *Durnford* vs. *Brookes' syndics*, as an authority in point.

The cases of *Norris* vs. *Mumford*, and of *Ramsay* vs. *Stephenson*, are relied on: the parties in one case being residents in Maryland, in the other in New-York. This brings us at once to the consideration of a question of the highest importance, viz. by what laws is this court to be governed in its examination of the import, validity and effects of the sale in question in this suit, whether by the *lex loci contractus*, or the *lex fori*?

I should not trouble the court with an argument, on a point which seems to have been well settled among all civilized nations for many centuries, was it not for an impression that seems to exist in the mind of the plaintiffs' counsel, that the question has been decided

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against me by this court, in the two cases last referred to, and that the *lex fori*, and not the *lex loci contractus*, is to prevail.

If such be the fact, I have only to deplore the result of a decision from which so many inconveniences and embarrassments must necessarily flow. Arguments *ab inconvenienti*, though generally of little weight, may be urged, with peculiar force, against a decision in one state, hostile in itself against the laws of a sister state, and destructive of the rights of its citizens. I cannot believe that the judges of this court ever have been, or ever will become, the advocates of such a monstrous doctrine.

The case of *Norris* vs. *Mumford* was an attachment, levied on a parcel of cotton; in the hands of the defendants' agents. The cotton had been previously sold to the claimants. From a careful review of this case it does not appear that a decision on the question of *lex loci* or *lex fori* was ever contemplated by the court in its judgment. On the contrary that the subject was merely glanced at by one of the counsel, more as an incidental circumstance, than relied on as a matter of argument; as we find the substance of his observations on that subject comprised in this short sentence: "this court will respect *legem loci contractus*." And

the court, in pronouncing their final opinion on the case, pass over the whole doctrine *sub silentio*.

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The case of *Ramsay* vs. *Stephenson* seems at best but of doubtful authority in the present. That was a claim on the part of certain individuals, styling themselves assignees of the defendant, in the state of Maryland, under a voluntary assignment, made there of property in New-Orleans. It is true the counsel for the assignees contended that the law of Maryland, and not the law of Louisiana, ought to govern this court, in their construction of the contract.

But the facts, in that case, differ materially from this—In that, the assignment was voluntary, in which the parties had thought proper to make their own law, to which they appealed, and not to the law of Maryland, as we find the following reasoning of the court clearly establishes the fact, that the assignment relied on, so far from being in conformity to the laws of Maryland, was directly in violation of them, and invoking the laws of Maryland, in support of such a contract, was neither more nor less than invoking laws that never existed. "Were it necessary (said the learned judge in his opinion) to a proper decision of this case, we are of opinion that it would not be difficult to shew such a

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difference between assignments made at the mere will and pleasure of debtors, in which they attempt to lay down rules for the payment of their debts and the distribution of their estates, and those executed under a commission of bankruptcy, as would require the application of principles almost totally different in different cases."

Again, it will be seen from a review of the facts, in the above case, that the act of assignment never was completed, and consequently could not be considered as a contract in the state of Maryland or elsewhere.

It was a voluntary transfer for the use of *all the insolvent creditors*. *All* his creditors did not assent to it, as clearly appears from the fact that the plaintiff in the suit disavowed the transaction, and, withholding his assent, proceeded to attach the defendants' property as if no assignment had ever been made, or what is the same, an attempt to assign, without perfecting it. The court, therefore, decided correctly in saying, what, I presume, is all they have said or intended to say in this case, that the pretended assignment was in reality none, and that it ought not to have any binding force upon a creditor not a party thereto. The court have not said in that case, nor in any other that I have met

with, that a contract complete in itself, and made in conformity to the laws of one state, should be construed or have effect by any other laws than that of the place where the contract was executed.

Could it then be possible for a doubt yet to remain, I apprehend that it must yield to the decision of this court, in the recent case of *Lynch* vs. *Postlethwaite*, *ante* 69, which, I presume, puts the question completely at rest.

In this case, it appears from the facts admitted or proved, that the contract had been entered into in the state of Mississippi, for the delivery of a steam-boat in the state of Louisiana. In the opinion of the court we find the following emphatic and conclusive language. "The defendant was personally bound by the contract. He is admitted, by the pleadings, to be a stockholder of the Natchez Steam Boat Company; and he subscribed the contract. According to the common laws of England, which is shewn to prevail in the state of Mississippi, all the members of an unincorporated company are bound as members of an ordinary partnership."

Again, says the judge: "the nature, effect and validity of a contract like this are to be inquired into, according to the law of the place in which the contract is celebrated, even when the delivery of the thing, or the act stipulated for, are to be performed abroad."

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This decision carries with it a precision and certainty which must silence all cavil; uniform and consistent with itself, it is no less so with the laws of Spain, and the general commercial law of the United States.

In the partidas of Spain it is said: if the laws or jurisprudence of another country, over which our authority does not extend, should be appealed to, We order that, in our dominions, they shall not be received in evidence, except in disputes arising between individuals of such foreign country, or contracts made there. *Partida* 3, 14, 15.

This doctrine is in strict conformity to the established usages and commercial laws of the United States, and of England, as laid down in a variety of cases which it is unnecessary to read, and to which I beg leave to refer the court. 2 *John.* 235; 4 *John.* 285. 3 *Cain.* 154. 1 *East.* 6; 5 *East.* 131. 8 *T. R.* 609. 2 *H. B.* 513. 1 *Emerigon, ch.* 4, § 8.

In *Preimsdyk* vs. *Kane & al.* judge Story observes: "The rule is well settled, that the law of a place, where a contract is made, is to govern as to the nature, validity and construction of said contract, and that being valid in such state, it is to be considered equally valid, and to be enforced every where with the excep-

tion of the cases in which the contract is immoral or unjust, or in which the inforcing it in a state will be injurious to the rights, the interest or the convenience of such state, or its citizens. This doctrine is explicitly avowed, in *Huberus de conflictu legum*, 2 *tom. lib.* 1 *tit.* 3, and has become incorporated under the code of national law in all civilized countries." 1 *Gal.* 375. These authorities, I trust, are sufficient to induce this court to decide that the contract, now in question, must be governed by the laws of New-York, in other words, the common law of England.

The next inquiry is, whether, according to the laws of that state, or the common law, the contract is valid; and whether a debtor in insolvent circumstances is permitted to prefer one creditor to another.

For deciding this question, the court will find but little difficulty. In 15 *Johnson*, 571, in the case of *Murray* vs. *Briggs*, we find the doctrine clearly and explicitly established by the decision of chief justice Thompson: "I think, says the the judge, that I may then assume it, as a settled and unshaken principle, both at law and in equity, that a failing debtor has a just, legal and moral right to prefer in judgment one creditor

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to another." The same doctrine will be found in 5 *Johnson*, 335 *Wilkes & Fontaine* vs. *Ferris*.

In 2 *P. Williams*, 427, the court will find the case of *Small* vs. *Oudley*, in which the master of the rolls observed: "There may be just reason for a sinking trader to give a preference to one creditor before another, to one that has been a faithful friend, and for a just debt lent him in extremity, when the rest of his debts might be due from him, as a dealer in trade, wherein his creditors may have been gainers. Cases, says he, may be so circumstanced, that the trader may, nay ought to, give the preference."

This principle applies with great force and propriety to the case now under consideration; the claimant being a creditor for advances, and endorsements on the defendants' paper for their exclusive benefit, and some part of which, if not the whole, may reasonably be presumed to have gone to the benefit of those creditors who now contest this claim. Creditors by endorsement have been uniformly considered as having strong claims to priority and the protection of the courts of justice. In support of the same principle, I refer the court to 10 *Mod.* 489. 5 *T. R.* 424; 8 *T. R.* 528. 2 *Johnson*, 84.

The validity of the sale being sufficiently established, it remains only to be ascertained whether

the claimant has pursued the necessary steps to obtain possession of the property sold. Is a delivery, of a ship sold, necessary to complete the sale? I humbly contend a sufficient, and the only, delivery of which the thing is susceptible has been made in this case; and that it is all that is requisite by the laws of England, the laws of the United States, or even by the civil law. In 2 *Durnford and East*, 462, *Atkinson vs. Maling*, it was the unanimous opinion of judges Ashhurst, Buller and Grose, "that if a ship be sold whilst at sea, the delivery of the grand bill of sale amounts to a delivery of the ship itself. It is the only delivery, says justice Buller, the subject matter is capable of." Again, *id.* 466, "the bill of sale is the only evidence of property."

In the same case, justice Grose observes; "there is a great difference between the sale of a ship at sea, and of other goods; a person by being in possession of a ship does not thereby acquire any credit; if he has no bill of sale to produce, his bill of sale amounts to nothing, therefore it has been invariably held, that the delivery of a grand bill of sale, is a delivery of the ship itself."

See *Law Mer. Am.* 73, and the cases there cited, 2 *Vezey*, 272. *L. M. Am.* 526, 527. 4 *T. R.* 161.

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sale, yet the execution and delivery of the ordinary bill of sale, used in the conveyance of vessels is all that is necessary. On this point I refer the court to 4 *Mass. Rep.* 661. *The Portland Bank* vs. *Stacey & Mansfield*, a case reversed, in which chief justice Parsons observes, "that he knew no difference, and believed there was none, between what is called the grand bill of sale in England, and the bills of sale for vessels used in this country."

It being, therefore, clearly established that the claimant's title was made for a *bona fide* consideration, and according to the laws of New-York, and the title paper duly delivered, was it incumbent on him to use any further exertions to perfect his title? It may be contended that actual possession of the ship should have followed the sale: this I presume will not be considered essential. The ship not being in New York, at the time, no actual possession could possibly have been taken there, but the court has already seen that an act tantamount to taking possession was executed in the delivery of the bill of sale, and, although no further act was necessary, yet it seems by the statement of facts, that not the slightest negligence or delay can be inputed to the claimant; he has done what

prudence might have suggested, but which the law did not require. Presuming the ship might arrive in the port of New-Orleans before she returned to New-York, he forwarded the bill of sale to his agent in New-Orleans, who forthwith lodged the same in the custom-house, within thirty days from its execution. This mode of proceeding in taking possession, if at all necessary, might have been suspended until the return of the vessel to the port where the transfer was made, as is clearly established by the doctrine in the case of the Portland Bank before referred to. Even under the statute of 21 James, the purchaser of a ship was bound to nothing more than to take possession of the vessel as soon as she was within his reach. "By the construction of that statute, says chief justice Parsons, a sale of a ship and cargo abroad is good, although possession be not immediately delivered, provided the evidence of the title be delivered, and the vendee take possession as soon as the property is within his reach."

In that case the schooner Ann and her cargo, then lying in Charleston, South-Carolina, was transferred by bill of sale, dated in Massachusetts on the 26th of December, 1807, and on the fourth of January following the Ann arrived at Gloucester in Massachusetts, and was on that

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day attached by the *bona fide* creditors of the vendors. The vendees did not take possession of the schooner and cargo until the 18th January. The court decided that there was no unnecessary delay in taking possession, and gave judgment for the claimants.

Here I might safely rest the cause of my client. The court, however, will probably have observed that all the cases, cited as authority on the part of the claimant, are in relation to the *entire* ship, which is susceptible of some kind of actual possession. But in the case of the sale of part of a ship the necessity of taking any kind of possession does not exist, nor does the law require it, neither is it possible in the nature of things to effect it. This doctrine is, at this day, well settled law, under a variety of decisions.

In *Lex Mer. Am.* 72, it is stated, "If an entire vessel be bought, possession should invariably be given. When from existing circumstances it is impossible to comply with the rule of law, as should the vessel be at sea at the time of her sale, a symbolical is tantamount to an actual delivery, because it is the best of which the nature of the case will admit. If only a part is disposed of, possession need not

be given, because the possession of one part owner is the possession of all."

Again, in same book, 527, 528, "where the sale is only of a share of a ship, the taking possession is not necessary even though the grand bill of sale have not been delivered." See also the cases *Gillispy* vs. *Coutts*, *Ambler* 652. 1 *Vesey, junr.* 168.

Livermore, in reply.—It has been attempted to distinguish this case from those heretofore decided in this court, and cited in the opening. The distinction, taken between this and that of *Durnford* vs. *Brooks' syndics* is, that here the defendants and claimant are citizens of New-York. This distinction will not, however, apply to either of the other three cases. In all of those cases the same attempt was made to distinguish them upon this ground, but without effect. That, in fact, there is no distinction, the claimants' counsel does not deny. But he contends that, in *Norris* vs. *Mumford*, this point was not made. By reference to the argument, however, 4 *Martin*, 21, 2, it will be seen that the attention of the court was expressly called to this point. In *Ramsay* vs. *Stevenson*, it was argued at great length, that the question ought to be decided according to the laws of Mary-

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land, and that by those laws the property was fully vested in the assignees. The effect of this case the gentleman endeavours to avoid, by alleging that that was a voluntary assignment for the use of all the creditors of Stevenson, and that it was not perfected, because all had not consented to the terms of it. The answer is, that the effect of the deed was to vest the legal estate in the trustees; and, in deciding the case, the court clearly intimate, that the trustees might hold, for the purposes of the trust, such property as came into their possession. But the language of the court is express, that this cause must be determined upon the principle of *Durnford* vs. *Brooks' syndics*; that giving to the assignment all the effect of a sale to a *bona fide* purchaser, a delivery of the goods was necessary to perfect it, 5 *Martin*, 77. The last case, of *Fisk* vs. *Chandler* has not been noticed by the claimants' counsel. I shall merely observe, that the facts in that case were the same as in this, and that all the gentleman's arguments would have been equally applicable there.

But it is contended, that the decision of this court in *Lynch* vs. *Postlethwaite* is inconsistent with the previous cases, and that these cases must be considered as having been overruled. The case of *Lynch* vs. *Postlethwaite* has intro-

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duced no new doctrine of international law. It is then merely decided, that, between the parties to a contract, the construction of the contract must be according to the laws of the place where it is made. The parties are considered to have these laws in view, when making the contract, and that there is a tacit assent on their part to be governed by these laws, in expounding it. But there is no such assent on the part of third persons, not parties to the contract. If the present contest were between the claimant and his vendors, the defendants in this action, there might be some force in the argument drawn from the case cited; but between the claimant and the plaintiffs, who were no parties to his assignment, it can have no effect. The judgment in *Lynch* vs. *Postlethwaite* decides nothing more than the questions then in dispute. These questions respected the defendant's liability, as member of an unincorporated company established in the state of Mississippi, and upon a contract made there, and the quality of the article which was the subject of the contract. It was determined that, upon these points, the contract must be construed by the laws of that state. When the *lex loci contractus* is called in aid of the construction of a contract, it is not

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done with the view of enforcing the laws of a foreign state; because the general rule is that the courts of one country do not enforce the laws of another country. But it is done for the purpose of ascertaining the intentions of the contracting parties. It is for the purpose of knowing to what they intended to bind themselves, at the time of entering into the contract. The rule cannot be extended further than the reason upon which it is founded, and consequently cannot apply to a case where the interests of third persons are involved.

The quotation from the Partidas is against the claimant's doctrine, and not in his favor. The prohibition against appealing to the laws of other countries is general; and the exception manifestly applies only, to the parties, to contracts executed abroad.

The case cited from *Gallison* was also a case between the parties to a contract; and the observations of judge Story must be understood with the same limitation. Another exception is there made, even in questions between the parties. The case excepted is one, "in which the enforcing a contract in a state will be injurious to the rights, the interests, or the convenience of such state or its citizens." This is an exception, to which I beg leave particularly to

call the attention of the court. The interests, or convenience of a state may be affected by the establishing of general principles in their nature injurious, although a citizen of the state may not be the immediate sufferer. In the present case, the plaintiffs reside in France. But can it be said that the decision of the court shall be other than it would be, if they were citizens of Louisiana? Our laws recognise no such distinction. The remedy of an attachment against the property of absent debtors is given to foreigners, as well as to citizens. The same general rules must be applied, without reference to the citizenship or residence of the parties; and the same decision must be made in this cause as if the plaintiffs were resident in New-Orleans. That the effect of the principles maintained by the claimant's counsel would be inconvenient and injurious, cannot be doubted. The legislature has given the remedy of attachment as a beneficial remedy, and the laws of the state give effect to the attachment upon all property of the absent debtor within the state, and not previously transferred by delivery to a *bona fide* purchaser. Such has been the tenor of all the decisions of this court. When the creditor institutes his suit, he is required, by those decisions, to look no further,

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than to the original ownership and continued possession of his debtor. But if these cases are to be overruled, the remedy of attachment will be destroyed; and after great expenses have been incurred by the attaching creditor, he will find himself defeated by collusion and fraudulent conveyances. This mode of proceeding to enforce the payment of debts is in fact peculiarly intended for the benefit of the state and its citizens. The benefit is extended to aliens and citizens of other states, and they occasionally enjoy it. But in nearly all cases the debtor is an alien to the state, and this is the sole remedy to compel an appearance or obtain security for the debt. Can there be a doubt, then, that the interests and convenience of the state and of its citizens require that the rule heretofore established should be adhered to, and that the property of absent debtors, found within the state, should be subject to its laws of attachment, instead of being portioned out by the debtors among his favoured creditors, who will always be citizens of the same state with himself, or fraudulently covered for his own use?

The claimant's counsel contends, that this assignment is valid by the laws of New-York. The decision reported in 15 *Johnson* may per-

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laps be taken as evidence of the law of New-York; but it does not go the length of this case. It is there merely decided, that a failing debtor may lawfully prefer one creditor to the others. But it does not establish the doctrine, that the debtor may divest himself of his property, by a mere bill of sale without delivery, so as to place it beyond the reach of his other creditors.

The deficiency is attempted to be supplied by two or three cases decided in England, and by one in Massachusetts. That decisions in Massachusetts are evidence of the laws of New-York, is denied. And the claimant does not shew, as he ought to have done, that English decisions are authorities there. But what is the amount of these decisions? *Atkinson* vs. *Maling* is cited to prove, that in the sale of a ship at sea the delivery of the grand bill of sale amounts to a delivery of the ship itself. Why was it so decided? Because, says Buller, J. "the grand bill of sale is the only monument of property." The quotation from the argument of Grose, J. is more full. The distinction, made by him between the sale of a ship at sea and of other goods, is this, that the possession of a ship, without the grand bill of sale, does not give a false credit. But the gentleman's quotation is not complete. Grose, J. says, that

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"a person by being in possession of a ship does not thereby acquire any credit; because whoever is requested to advance money thereon will require to be shewn how the holder is owner; and if he has no bill of sale to produce, his possession alone amounts to nothing. Therefore it has been invariably held that the delivery of the grand bill of sale is a delivery of the ship itself." There is some substance in these observations, as applied to the grand bill of sale. But there was no delivery of a grand bill of sale in this case. The gentleman says, however, that we have no grand bill of sale in this country; and he cites a case from 4 *Massachusetts Reports* to prove, that there is no difference between the grand bill of sale in England and the bills of sale in this country. With great deference to the opinion of chief justice Parsons, I conceive that there is an essential difference. The English grand bill of sale is a bill of sale from the builder of the ship, and it is a muniment of property which always accompanies it. The first owner transfers it to his vendee; the first vendee to the second; the second to the third; and this title paper, the sole muniment of property, passes from hand to hand through all the assignments of this species of property. It is, therefore, with us,

son held to be a symbol of the property itself; and a delivery of it is regarded as a symbolical delivery of the ship itself. Possession of this is at least *prima facie* evidence of property, and the possessor gains credit accordingly. Is there any resemblance between such a bill of sale, and the bills of sale known among us? With us, the only evidence of ownership to which persons look, and which gives credit to the possessor, is the register. The person, in whose name that stands, has credit as owner. The possession of a bill of sale gives no credit. It may be evidence that the holder was once owner; but not that he continues owner. For he does not deliver up his bill of sale, when he sells the ship to another person. This is taken to the custom-house; the former register is cancelled, and a new one made out in the name of the vendee. How can it be contended, then, that the bill of sale delivered in this case was a delivery of the ship, more than that a bill of sale of any other moveable property is a delivery of the property? In *Norris* vs. *Mumford* it was argued that the delivery of the order upon Talcott and Bowers was a symbolical delivery; but it was decided not to be; and the court with great force shewed that the property being at a distance and possessed by the de-

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fendant only, through his agents, was a circumstance against the claimant, and not in his favour.

In the case cited from 4 *Mass. Rep.* chief justice Parsons makes no distinction between the ship and cargo, and none can be made. *Norris* vs. *Mumford* is, therefore, precisely in point. It is contended here that the delivery of the bill of sale is tantamount to a delivery of the ship; and in that case it was contended that the same effect should be given to the delivery of the order upon Talcott and Bowers. Est. Mathews, J. said, "The order to Talcott and Bowers, in the opinion of this court, is only evidence of the sale by Mumford to the persons intervening and claiming the property, and does not amount to a transfer of the legal ownership and dominion of it, so as to prevent the creditors of the vendor from seizing and having it sold to satisfy their just claims, before actual delivery under the order." The same remarks will apply in this case. The bill of sale is evidence of the sale by Jenkins and son to the claimant; but the legal ownership was not thereby transferred, so as to prevent the creditors of Jenkins & son from seizing the property, before a delivery under the bill of sale. In *Norris* vs. *Mumford*, the defendant had possession of the cotton only by means of this

agent. In this case the defendants had possession of the ship by means of their agent, the captain; and the only evidence of their title, to which their creditors could look, was in the custom-house at New-Orleans. The defendants, therefore, could make no real delivery, except by the intervention of their agent in New-Orleans, by notice to the captain, and by lodging the bill of sale in the custom-house.

Another distinction is urged, that this was the sale of a moiety, and not of an entire ship. When a part of a ship is sold, the gentleman says, no delivery is necessary. I know of no such distinction in our laws. It is said, that in the case of the sale of part, delivery cannot be made. But when the property is abroad no delivery can be made at the time, in any case. And when the property is present, an actual delivery, or what is equivalent to it, can be made of a part, as well as of a whole. As I observed, in the opening of this cause, if the bill of sale had arrived in New-Orleans two days sooner than it did, the register might have been changed, the captain might have been instructed to hold for the new part-owner, and the delivery would have been complete. In support of this distinction the claimant's counsel quotes some observations from *Oaines' Law*

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Mercatoria Americana. The authority of these observations must rest entirely upon the author's character. The only cases which are cited by Caines, to support his position, are those which the claimant's counsel has also cited, *Gillespie* vs. *Coutts*, *Ambler*, 652, and *Ex parte Studdroom*, 1 *Vez. jun.* 163. In the second case there was no decision. And in the case of *Gillespie* vs. *Coutts* this point was not decided, as is supposed by the claiman't's counsel. The case was this: the owner of eight sixteenths of a ship mortgaged them to the defendants, Coutts and Stephens, and afterwards sold the same shares to different persons by assignments. One of these persons, the plaintiff, took possession of the whole ship, and got possession of the grand bill of sale, upon which the names of all the purchasers were endorsed, but there was no date to it. He brought his bill to be preferred. For the defendants it was argued, "that they were honest creditors, and that if they had been guilty of neglect all the other persons had been so also; that the indorsements were without date, and it did not appear on what occasion they were made; that possession is not required upon sale of a ship, which in many cases is impossible; that Coutts and Stephens' debt was lent only upon a part of the ship, and

therefore if possession ought to be delivered in case of a sale or mortgage of the whole ship, yet it was not requisite, nor hardly possible, of a part only; that the mere possession of the grand bill of sale was not sufficient to give a preference; and that it did not appear how or when the plaintiff got possession of it." The reporter says that, "Lord Camden was of opinion with the defendants Coutts and Stephens, for the above reasons; and added, that the plaintiff and the other seven purchasers, are to be considered as standing in the place of the vendor, and took the shares subject to the debts charged upon them." This is all that is contained in the report. The Lord Chancellor gives no reasons for his opinion, but merely refers to the reasons urged for the defendants. The relevancy and force of this decision must, therefore, be tested by those reasons, and we have no means of judging as to which of them weighed most with the court. Some of them appear to proceed upon the ground of fraud, or negligence in the plaintiff. It is said that possession is not required upon the sale of a ship, or of part of a ship, because it is hardly possible. This is the only reason given for not requiring delivery. I believe that sufficient has been said, to show that this reason is not en-

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titled to any weight. There is nothing said in the cases cited of the other part-owner's possession being the possession of the vendee, nor any thing to justify the broad principle cited from Caines. This notion is, however, borrowed from a book of authority, *Abbot on Shipping*. But the limitation is not taken also. In referring to these cases it will be observed, that Abbot speaks with great caution. He does not speak of this distinction as of one settled by any judicial decision; but rather as of one suggested by counsel and not decided. He also accompanies it with a most material limitation. His words are these: "but in case of a sale, or agreement for sale, of a part only, it has been thought sufficient, if the vendor, having delivered the muniments of his title, ceased from the time to act as part-owner, actual delivery of a part *being said* to be impossible. This, however, should be understood with some limitation; for if a part-owner has the actual possession of the ship, it is not impossible for him to deliver the possession: if he has not the actual possession, the possession of the other part-owners may reasonably be considered to be the possession of the vendee, after the sale." *Abbot*, 10.

In the case before the court, the defendants

had actual possession of the ship, by means of their captain; and it was in their power to deliver actual possession to the vendee, by an order to the captain, their agent. Upon receipt of such an order the captain would hold the ship for the vendee as his agent, and the property would be changed. The case supposed by Abbott, where the property in a part of a ship would be transferred without a delivery, and where the possession of the other part-owner may be considered the possession of the vendee after the sale, is one where the vendor has no concern in the actual management of the ship, where he is merely a dormant partner, who receives his proportion of profit and pays his portion of the ship's expenses, but has no concern in the direction of her voyages nor in the appointment of her captain. In such a case, the managing part-owner might reasonably be considered as representing, not only his own share, but the share of the other part-owner, as having possession for himself as owner, and for the other as agent. In such a case, a bill of sale from the secret part-owner, accompanied by notice to the acting part-owner, might be considered as a complete transfer, and that the share, which the latter had represented as agent, would pass to the vendee through the interven-

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tion of the same agent. It would be necessary, however, for the claimant to make out such a case, before he can take this property from the attaching creditors. He would shew, that the defendants had not the actual management of this ship, that the other part-owners had the exclusive control, and that notice of the transfer was given to them previous to the attachment. Nothing of the kind appears, or is pretended, in this case. And the burthen of proof is upon him. The defendants were part-owners when their acceptance became due; the claimant derives title from them through a subsequent transfer; and it is his duty to shew, that the title was fully divested from his vendors, and vested in him before the attachment of the plaintiffs.

I owe an apology to the court for occupying their time in the discussion of a question which has been so solemnly and repeatedly decided. But the assignees of failing debtors are pertinacious in the support of their claims, and persevering in search of distinctions where no distinctions are to be found. There is, I believe, no real difference between the principles of the civil and common law, concerning the transfer of property. To be complete, the transfer must be by delivery. This may be an actual delivery,

or a mere transfer of title, where the vendor is already in possession upon another title. The first requires no explanation. The last is not pretended here. In England, the grand bill of sale is held to be a symbol of the ship; and perhaps if the property of ships, in this country, were attended with an instrument of the same nature, the same effect might be given to it. That the delivery of a common bill of sale can have such an effect, is a doctrine which finds no support, except in a solitary case decided in Massachusetts. That case is, however, directly contradictory to the case of *Norris* vs. *Mumford*, and cannot, therefore, affect the decision of this cause. It is also, I conceive, contrary to all the principles of the civil and common law. A delivery of some kind is in all cases required. Even in the case, stated by Abbot, of a part owner selling his share, the manner in which he limits the exception evidently shews that he considered a delivery of some kind not to be dispensed with. Possession may be taken by an agent for the use of his principal; and it can only be upon this principle, that the possession of the part owner can be deemed the possession of the vendee. But a person cannot possess as agent unless with the will of doing so. A part owner not knowing of the transfer cannot, even by the

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most subtile course of reasoning, be considered as taking possession for the assignee. *Put procuratorem nobis adquiri possessionem ita demum, si velit nobis possidere, si operam nobis solis suam accommodet, si possessionem apprehendet nostro, non suo nomine, et mandata similiter nostro. Cujas, ad l. 1. §. 20 ff. tit. de adq. vel amitt. poss.* If the mere circumstance, of the vendor not having the actual corporal possession at the time of sale, be a reason for construing the possession of one man to be the possession of another, without any knowledge or communication between them, then the possession of Talcott & Bowers should after the sale have been decreed the possession of the vendees. With great confidence I leave this case with the court, believing that a process of reasoning so refined and insubstantial, as that which is required to support the claim of the intervening party, will not be sufficient to shake the principles which have been so well established by this court.

Martin, J. delivered the opinion of the court. This case differs from that of *Norris* vs. *Mumford*, in a very material point. There, the cotton, the subject of the sale, was in New-Orleans; and we held that, as the sale of it, if made in this city, would not divest the vendor

from his property, with regard to his creditors, it could not, though made in New-York, affect the rights of the latter. As to them, the cotton remained the property of the vendor, their debtor, till after a delivery to the vendee. A contrary decision would have given effect, in our own state, to the laws of another, to the injury of our own people. If A. and B. be partners, in New-Orleans, and C. purchases from A. a quantity of cotton, in the ware-house of the firm, will his right thereto, if he take instant possession of it, be affected by a sale made a few days before, by B. in Natchez or Mobile? Will not C. be listened to, in his own state, when he shews that by the *lex fori*, that *loci contractus*, that of the domicil of his vendors and his own, the sale and delivery vested the property?

In the present case the ship, the subject of the sale, was at sea, was a New-York ship, and the vendors and vendee resident in New-York. If, therefore, according to the *lex loci contractus*, that of the domicil of both parties, the sale transfers the property, without a delivery, it did so *eo instanti*, or not at all. In transferring it, it did not work any injury to the rights of the people of another country, it did not transfer the property of a thing, within the jurisdiction of another government.

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If two persons, in any country, choose to bargain, as to the property which one of them has in a chattel, not within the jurisdiction of the place; they cannot expect that the rights of persons, in the country in which the chattel is, will there be permitted to be affected by their contract. But, if the chattel be at sea, or in any other place, if any there be, in which the law of no particular country prevails the bargain will have its full effect *eo instanti*, as to the whole world; and the circumstance of the chattel being afterwards brought into a country, according to the laws of which the sale would be invalid, would not affect it.

The laws of another country, even of a sister state, are foreign laws, and foreign laws ought to be proven as facts. This court has so very often indulged parties, in establishing any particular part of the common law of England as it prevails, it is believed, in every one of these states but this, by the production of books of reports and elementary works, that it would work great injustice, if we rigidly refused to listen to the counsel in this respect, because the part of the common law invoked makes no part of the statement of facts. Neither of the counsel require it, and both are willing we should pronounce on the evidence of that law, which they have presented.

There is not the least room to doubt that the interest of the vendors in the ship passed to the vendee, under the principles of the common law of England, as they are understood by the supreme court of the state of Massachusetts, and the circuit court of the United States for that district. In a case perfectly similar, in every respect, to that under our consideration, the supreme court of Massachusetts determined that the *bona fide* conveyance of a vessel and cargo, by deed, to secure the payment of money, the vessel being abroad, at the time of the sale, is valid against creditors; provided the vendee takes possession of her without delay, upon her return: and there is no difference between the grand bill of sale, used in England, for the conveyance of vessels, and the bills of sale used in this country. *Portland Bank* vs. *Stacy & al.* 4 *Mass. T. R.* 661.

But, the plaintiffs' counsel contends that the above case is in direct opposition to the decisions of this court? Is it strange that the judgments of two courts, deciding according to different systems of laws, should be dissimilar?

Further, it is urged that the decisions of the supreme court of Massachusetts are evidence of the laws of that state, but not of those of New-York. It is admitted that the common law of England prevails in both those states.

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The supreme court of the state of New York holds that a regular bill of sale is not absolutely necessary to transfer the property of a vessel, that it passes by delivery like another chattel. *Wendover & al.* vs. *Hogeboon & al.* 7 *Johns.* 308.

Judge Story, in *Meeker & al.* vs. *Wilson*, says that, by the common law of England, a grant or assignment of goods and chattels is valid between the parties, without actual delivery, and the property passes immediately upon the execution of the deed: but, as to creditors, the title is not considered as perfect, unless possession accompanies the deed. 1 *Gallison*, 323. This is the principle, which has regulated this court in the decisions cited at the bar. But, the learned judge continues: an exception to the rule is, where the possession of the grantor is consistent with the deed, or where the property conveyed is, at the time of the conveyance, abroad and incapable of delivery. In the latter case, the title is complete, provided the grantee takes possession, in a reasonable time, after the property comes within his reach.

The laws of Louisiana do not, it is true, recognize the last exception. Property does not pass here by contracts, but by delivery: *traditionibus, non pactis.* If the ship had been within the state, at the time of the sale, the rule

in *Norris* vs. *Mumford* would have regulated the decision of this court: but as at that time she was not within the state, the sale ought not to be tested by our laws. It must be by those *loci contractus*, against which those of no other country ought to prevail.

Farther, there seems to be great weight in the position that no delivery can take place of an undivided part of a chattel, not susceptible of division.

The case cannot be distinguished from that in Massachusetts, and from the evidence adduced to us, from which we are to determine what is the rule of the common law of England, we conclude that the district court did not err, in sustaining the claim.

It is, therefore, ordered, adjudged and decreed that the judgment of the district court be affirmed with costs.

DAUTERIVE vs. *NETO.*

APPEAL from the court of the parish and city of New-Orleans.

If a rule to shew cause, is neither enlarged nor made absolute, on the day given, it cannot afterwards be discharged, without notice to the party who obtained it.

MATHEWS, J. delivered the opinion of the court. It appears in this case, by the record, which the the judge has certified, to contain all the facts upon which it was tried, that it was, after no-

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tice of trial had been given to the plaintiff, submitted to the jury on the part of the defendant, who obtained a verdict; and a rule afterwards was taken against him to shew cause why the verdict should not be set aside and a new trial ordered; that two days after that given to shew cause, the rule was set aside and judgment given for the defendant, in pursuance of the verdict, without notice to the plaintiff, who appealed.

On this statement of the case, we are of opinion that the judgment proper to have been rendered in the parish court was a judgment of nonsuit; and that the parish court erred, in discharging the rule by which the defendant was required to shew cause. No cause having been shewn, the rule unless enlarged, might have been made absolute, on the plaintiff's motion; but, as it seems to have been left open, notice of the time at which it was afterwards to have been argued, ought to have been given him.

It is, therefore, ordered, adjudged and decreed that the judgment be annulled, avoided and reversed, and that the cause be remanded, with directions to the parish judge to reinstate the rule and proceed thereon, according to law.

Grymes and *Canonge* for the plaintiff, *Duvesac* for the defendant.

STRINGER vs. *DUNCAN & AL.*

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If the record does not shew the facts of the case, and that the appeal was taken for delay only, damages cannot be given.

APPEAL from the court of the parish and city of New-Orleans.

DERBIGNY, J. delivered the opinion of the court. This appeal comes up without the testimony taken in the court *a quo*, either in the shape of a statement of fact or any other. We have, therefore, nothing to do, but to dismiss it.

The plaintiff and appellee has prayed for those damages, which the law authorises this court to grant, in cases of appeals taken for the sake of delay only. But, in order to support such an application, it was his duty to have brought the testimony himself, to enable us to understand the nature of the case, and see whether nothing but delay was intended by the appeal.

It is, therefore, ordered, adjudged and decreed, that the appeal be dismissed with costs.

Preston for the plaintiff, *Hawkins* for the defendants.

GORHAM vs. *DE ARMAS.*

Three judicial days must elapse before a judgment by default becomes final.

APPEAL from the court of the parish and city of New-Orleans.

MATHEWS, J. delivered the opinion of the court. This is a case in which the appellant,

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who was defendant, in the parish court, moved, on an affidavit that he had a good defence to make, that a judgment, which had been obtained against him, might be set aside, and that he might be allowed to file his answer to the petition.

A judgment by default, obtained on a liquidated claim, becomes final after the lapse of three days, if no defence be offered within that period. But, we are of opinion that, these must be judicial days, in which the court holds its sessions.

In the present case, it is admitted that, the parish court was not in session three days after the judgment by default, and three days before the defendant's application to be permitted to answer to, and defend the suit brought against him.

It is our opinion that the parish court erred in its decision, by which the defendant was denied the right of making his defence.

It is, therefore, ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, and that the cause be remanded, with directions to the parish judge to permit the defendant to file his answer, and to proceed to trial, according to law.

Hennen for the plaintiff, the defendant *in propriâ personâ*.

MONTEGUT & AL. vs. THOUART & AL.

The tacit mortgage on a natural tutor's estate, begins with the tutorship.

APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court. This is a case, in which the appellees, who were plaintiffs in the court below, claim a preference over other creditors, on the property of their father and natural tutor, to the amount of the dowry and matrimonial acquets and gains of their deceased mother.

So far as it relates to the dowry, their right of priviledge and preference is not disputed. But, it is contended, on the part of the defendants, that they ought not to be preferred to creditors of their father, merely personal, for the amount of the acquets; because there is no evidence of there being any at the death of the mother—and because the tacit mortgage, given by law to minors, on the property of their tutors, takes effect only from the completion of the inventory, and, in the present case, no inventory was made.

The first ground of opposition rests principally on matter of fact, and although with a little more industry, on the part of the plaintiffs, it is very probable that fuller and more satisfactory proof of the amount of property possessed by

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the father, at the death of the mother, might have been obtained; yet it is believed that sufficient evidence has been adduced to shew that it exceeded the sum for which judgment has been rendered in the district court.

It is true, that there is no testimony, shewing that this property was acquired during the mariage, but on the dissolution of the community every thing holden by the husband and wife is to be presumed common, unless proof of its being particular be exhibited. *Nueva Recop.* 5, 9, 1.

As to the second objection to the plaintiffs' right of preference, it is necessary first to determine by what laws the case is to be determined, by the present code or by the ancient laws of the country, should they differ; of which it is needless to enquire, as we believe, from the evidence in the case, that the rights of the plaintiffs originated before the promulgation of the code, and that they must be ascertained according to the laws, which previously governed the community.

The tacit mortgage, which is given by these laws on the property of tutors and curators, in favor of minors, began to operate with the tutorship, which takes place in various ways, either by the appointment of the judge, by will or by na-

ture. A father, being natural tutor, has no need of the interference of courts of justice to assume the rights and priviledges which belong to the office. With the commencement of these must also begin the legal mortgage on his property, for the faithful and due performance of his duties. This hypothecation is allowed, even against those who interfere with the estates of minors without any species of authority. *Febrero*, 2, 3, 3, § 3, *n.* 53.

On this view of the subject, we are of opinion that the tacit mortgage claimed by the plaintiffs has existed since the death of their mother, and that, although their claim carries with it no priviledge over other mortgage creditors, it gives them a preference to mere personal creditors.

We are also of opinion, that the court below was correct in allowing to one of the defendants the amount, secured by a mortgage anterior in date to that of the plaintiffs.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed: the costs of this appeal to be borne equally by the parties, as they have chosen, in the statement of facts, to be both considered as appellants.

Morel for the plaintiffs, *Hennen* for the defendants.

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HENNEN vs. JOHNSTON & AL.

HENNEN vs. JOHNSTON & AL.

The endorser is discharged, if the holder neglects the proper means of discovering the maker's residence, and makes no demand.

APPEAL from the court of the parish and city of New-Orleans.

MARTIN, J. delivered the opinion of the court. The petition states that the defendant, Laston, made his promissory note for the sum of $3,0,50, on the 12th of June, 1819, payable to the defendant, Johnston, or his order, sixty days after date, which the latter for a valuable consideration, endorsed to the plaintiff, and which, having been lodged for collection in the Planters Bank, was protested, on the 14th of August following, whereof the defendant, Johnson, was duly notified. Annexed to the answer is a copy of the note and protest. The notary, in the protest, does not set forth that he made any demand of the amount of the note; but that he "went to the places of most public resort in the city, and inquired for the maker of said note, in order to demand payment of the same, and none would designate the dwelling of the maker, or would pay the note for his honor."

Johnson, in his answer, denied being indebted to the plaintiff, and required proof of the demand from the maker, as well as of the due and legal notice to the endorser. Laston pleaded the general issue.

Pollock deposed that he is the notary of the Planters Bank; that the note was put into his hands on Saturday the 14th of August; that he made no other demand than that stated in the protest; that he gave notice to the endorser on Tuesday the 17th, between the hours of nine and ten in the morning.

Spencer deposed that he has known the defendant, Laston, in New-Orleans for about two and a half years; that he now keeps, and for about eight months past has kept, a grocery store or shop, on the levee.

Crocket deposed that he has known the defendant, Laston, for nearly three years; that during that time he has resided principally in New-Orleans, and for the last eight months he kept a grocery store in the suburb St. Mary, on the levee, fronting the river; that he always kept his name on the front of his house, and took out regular licenses from the mayor's office, as a grocer and retailer of liquors, and still continues the same business in his own name, and at the same place.

It was admitted that the defendant, Johnson, lives in New-Orleans and kept a store before, at the time of, and since the protest; that the note was made by Laston, and endorsed by Johnson; that the latter was informed by the

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plaintiff, on the 17th of August, that the note was not paid, and had been informed before that it was in the Planters Bank, and had received, from the plaintiffs, the bank's notice of the time of its becoming payable.

There was judgment in the parish court, for the plaintiff against the maker of the note; but the endorser was held to be discharged; the notice, in the opinion of the court, having been given too late. The plaintiff appealed.

The first point, which presents itself for investigation, is whether there was a proper demand made from the maker. It is in evidence that he has, for upwards of two years resided chiefly in this city, and that for the eight months preceding the day on which the note became payable, he kept a grocery store in a conspicuous part of it, with his name over his door. It is not alledged that his residence was unknown to the plaintiff, and we are left to infer that it was so to the notary, from the information he gives that he inquired for it, at several public places. The endorser having received the note from the maker within a short period, at the time of the protest, the presumption is very strong that the plaintiff might on application to the former have been informed of the residence

of the debtor. From the neglect of the most apparent means of obtaining knowledge of the place, where the demand was to be made, it is to be inferred that no other was resorted to, except that which is mentioned, viz. an inquiry from persons accidentally met at public places, none of which are described.

It seems the note was given to be protested, without any information of the place towards which the notary was to direct his steps.

The evidence shews, that with a little previous trouble, the plaintiff might have easily discovered the residence of the maker. It does not appear that he was ignorant of it. The law, imposing on him the obligation of making the demand, imposed that of making the necessary inquiry in due time. *Unicuique sua mora nocet.* It appears that very soon after the protest, the sheriff found the maker of the note, and served the process of the court on him.

It appearing to this court, that no legal demand was made, through the plaintiff's neglect or that of his agents, it is useless to inquire into the legality of the notice of the protest to the endorser.

It is, therefore, ordered, adjudged and decreed.

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that the judgment of the parish court be affirmed with costs.

The plaintiff in *propriâ personâ*. *Morse* for the defendants.

WATSON & AL. vs. *M'ALLISTER.*

A motion to dissolve an attachment cannot be made after the trial has begun.

A witness who deposes of his belief, without giving the grounds of it, makes no proof.

APPEAL from the court of the parish and city of New-Orleans.

MARTIN, J. delivered the opinion of the court. This suit is brought on a promissory note, made by the defendant, duly endorsed to the plaintiffs. The property of the defendant was attached in the hands of Linton & Wilkins, who neglecting to answer the interrogatories, judgment was rendered against them, for the amount of the debt to be recovered against the defendant.

After the trial had been begun and proceeded on, and two witnesses had been examined, a motion was made by the defendant that the attachment be dissolved. This was resisted by the plaintiffs' counsel, on the ground that the motion was too late: the law only permitting such a motion to be made at any time, before the trial of the cause, 2 *Martin's Digest*, 516.

There was judgment for the plaintiffs, and the defendants appealed.

The case is submitted to us without argument.

A motion to dissolve an attachment is in the nature of a plea in abatement, and, if successful, its effect is perfectly the same. It ought, therefore, to be made *in limine litis*, and cannot be attended to after the trial of the cause has begun. The parish court was correct in disallowing the motion.

On the merits, the action being brought by the endorsees of a note, and the general issue being pleaded, it behooved the plaintiffs to prove the signatures of the maker and endorser.

Two witnesses depose that they have often seen the maker write, and they believe that he subscribed the note: this so far suffices; as to the endorser's signature they believe it to be genuine. But nothing shews, in the least, that they are acquainted therewith.

As they inform us, they have often seen the maker write, and produce a letter of his, in order to satisfy our minds that they know his signature, and, as they are perfectly silent in this respect, with regard to that of the endorser, we cannot conclude that they spoke, as to it, with the like certainty.

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To believe and to know are different things. The mere belief of a witness, without any additional circumstance, raises but the slightest presumption. If a man, with whom I have the least acquaintance, and of whom I know nothing disadvantageous, offer me a note, I will believe it genuine, and not suspect him of intended fraud. But this belief will not induce me to stake a large sum thereon: before I do so, I will expect something further. Now, if men will not trust their important interests on mere belief, those whose duty it is to dispose of the property of others, cannot proceed on the assurance which an honest man gives them, that he believes the disputed fact to be as the plaintiff asserts, contrary to the defendant's denial.

A belief, which results from the inspection of the handwriting of a person whom we have often seen write, or whose letters we have often received, is *prima facie* evidence, strong presumption & *stabit presumptio donec contrarium probetur*. But when we have not the ground of the belief of a witness, his naked assertion, that he believes, raises only the slight presumption, which moveth not at all. *Part.* 3, 16, 89.

The parish court, in our opinion, erred in giving judgment for the plaintiffs.

It is, therefore, ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, and that there be judgment for the defendants, as in the case of a nonsuit, with costs in both courts.

Workman for the plaintiffs, *Carleton* for the defendants.

PALFREY vs. *RIVAS.*

If the taker-up of a runaway keeps him four or five days in irons, sends immediately word to the owner, offering to purchase him, and the latter enters into a treaty therefor, and in the mean time the slave escapes, and the jury find for the defendant, the supreme court will not disturb the verdict.

APPEAL from the court of the third district.

MARTIN, J. delivered the opinion of the court. The petition charges that the defendant having arrested the plaintiff's runaway slave, instead of pursuing the means which the law directs, in order to secure him, kept him at work on his own plantation for fourteen or fifteen days; after which the slave escaped, and has never been heard of since. There was judgment for the defendant, and the plaintiff appealed.

From the statement of facts, which consists of the depositions of a number of witnesses; it appears that the defendant arrested the plaintiff's slave on a Sunday, secured him in strong iron fetters and informed the plaintiff of the capture, proposing to purchase the slave. He also procured a gentleman of the neighborhood

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to address the plaintiff on the same subject. Both letters reached the plaintiff, who immediately addressed the gentleman who had written, at the defendant's request, inclosing a small sum to defray the expenses of the capture, and requesting him to inform the defendant that he might have the negro for a price which was then fixed. In the mean time, during the night between the Thursday and Friday following the slave's arrest, he effected his escape.

In the letter of the plaintiff to his friend, desiring him to offer the slave for sale to the defendant, he requested that, if the offer was not accepted, the slave might be taken to a blacksmith, put in strong irons, and kept till an opportunity to send him to New-Orleans presented itself; but, if none could be had shortly, that he might be sent to jail.

The fetters put on him, by the defendant, are sworn to have been very strong, and in the opinion of the witnesses such as precluded the idea of his escape. The defendant, it appears, treats thus the negroes whom he arrests, and makes no charge against the owners.

The plaintiff relies on the act of 1816, 2 *Martin's Digest*, 514, n. 6. which provides that whenever a slave shall be apprehended, he shall be taken before the parish judge or the

next justice of the peace, who shall make inquiry as to his name, and that of his owner, and send him to jail, &c. He contends that, as the defendant did not comply with the requisites of the law, he must be liable for the consequences.

On the part of the defendant, it is insisted that the positive charge in the petition, viz. that the slave was kept at work for the defendant is disproven, and the implied charge of a neglect to comply with the requisites of the act cited, is not presented as a substantial cause of action, which the defendant was bound to disprove.

We are of opinion that the petition charges the neglect of the defendant, in a manner sufficiently positive to put him on his defence.

The act requires a person who takes up a runaway slave to carry him before a magistrate, but it does not fix any particular time for doing so. The taker up cannot be expected instantly to abandon his own work and go accompanied by his own negroes to the justice. A reasonable time must be allowed for that purpose. And this is a matter of fact. If he has business of his own pressing on him, which does not admit of a delay, he may secure the runaway during a reasonable time. If the owner resides nearer

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to him than the justice, he may well send him word to come and take his slave away. If the latter escape in the mean while, it is not clear that the taker up is to bear the loss. *Nemini debet suum officium esse nociosum.* Taking up a runaway slave is generally a kindly office. No private man is bound to undertake it. It is true the law provides a compensation, but few persons demand or accept it, and the defendant appears to be one of those.

The law of this case is pretty plain, and the jury who passed on it had but two facts to consider. Did the defendant neglect to carry the slave to a magistrate, for too long a time? Did not the plaintiff approve of the slave being kept as he was?

They have found for the defendant generally; and we are far from seeing that they erred.

This is certainly a very hard action, and every allowance must be made, in favor of the defendant, who acted with the best intentions, desirous of avoiding any useless expense to the plaintiff, and who treated the slave in the very manner in which the plaintiff desired he might be treated, if the defendant did not purchase him. The jury, who knew the situation of the defendant, his distance from the next magistrate, and his ability to spare hands to guard

the slave on the way, have said the plaintiff ought not to recover.

The plaintiff in two letters, before and after he heard of the escape of the slave, does not appear to have disapproved—did not complain of the conduct of the defendant. On the contrary, he used expressions therein, which might be construed into an approbation of his conduct; and if the verdict was grounded on a belief that it was approved and ratified by the plaintiff, we cannot say that the jury erred.

Upon the whole, the verdict and judgment appear to us correct.

It is, therefore, ordered, adjudged and decreed that the judgment of the district court be affirmed with costs.

Price for the plaintiff, *Eustis* for the defendant.

CARREL'S HEIRS vs. *CABARET.*

APPEAL from the court of the first district.

The action *inofficiosi testamenti* is barred by the lapse of five years.

The testator's concubine may prescribe under his will, against his bro-

Joseph Carrel, the plaintiffs' brother, died in 1806, having instituted the defendant his universal heir: his executor put her in possession of the estate, shortly after the testator's death, and

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thers and sisters.

she remained in the undisturbed enjoyment of it till the 24th of June, 1817, when the present suit was brought; the plaintiffs claiming the estate as legal heirs of the deceased, and alledging the invalidity of the will, as not being made with the requisite solemnity, and the incapacity of the defendant to take under it, averring her to have been the testator's concubine.

There was judgment for them, and the defendant appealed.

Moreau, for the plaintiffs. 1. The plaintiffs have the actions *inofficiosi testamenti*, in order to have the will of their brother annulled, as he instituted the defendant, his concubine, his universal heir. *Part.* 6, 7, 12. *Id.* 8, 12. *Cod.* 3, 28, 27. 1 *Hulot*, 447. 1 *Gomez Varia Resolut.* 240, *ch.* 11, *n.* 37. 5 *Febrero ano-dido* 8, 1, *n.* 3, *p.* 875.

Concubines are considered in law as persons of evil life, *de mala vida, turpes personæ. Gregorio Lopez on note* 2. *Partidas* 6, 7, 12. 1 *Gomez Var. Res. ch.* 11, *n.* 38. 1 *Morillo, cursus juris civilis*, 3, 26, *n.* 242.

The defendant opposes to our action the prescription of five years, under *Part.* 6, 8, 4. If this law be attentively considered, it will be discovered that it extends only to persons dis-

inherited for a cause they seek to disprove, and not those who were pretermitted in a will.

Even if this law could ever have been applicable to a case like this, it could not be invoked by the defendant, as it was repealed by a posterior one, which extends prescription in all personal actions to twenty years, and in all mixt actions to thirty years, notwithstanding any contradictory disposition, in the laws of Alphonso the wise. *Recop. de Cast.* 4, 15, 6. Indeed the *Partida* 6, 15, 4, speaks only of actions purely real, but it is clear that these, like mixt ones, are prescribed by the lapse of thirty years. 1 *Sala, Derecho de Espana*, 2, 2, *n.* 10.

2. Even if the plaintiffs were prevented by the plea of prescription of five years, from exercising the action *inofficiosi testamenti*, they should have that of nullity, which was heretofore prescribed by the lapse of thirty years, and since our code civil, by that of ten.

The will is void, either as a public or private one; if a public one, the notary, who received it, not having been present at its making. *Recop. de Cast.* 5, 4, 1, of the old edition, answering to 10, 18, 1, 1 *Febrero*, 1, 19, *n.* 203. If a private one, because it is not attested by the competent number of witnesses. This is fatal. *Recop. de Cast.* 5, 4, 2.

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It is true, the number of witnesses required by *Part.* 6, 1, 1, in nuncupative or open wills, was reduced to three, when the will was received by a notary, and to five in all other cases. *Recop. de Cast.* 5, 4, 1. But, according to this last law, the will is invalid, as there were but four, instead of five, witnesses. The defendant contends that the Spanish lawyers do not all agree, as to the necessity of the will being made before five witnesses, and that many hold that three witnesses suffice. This is the case only when the will is made in a place, in which more than three witnesses cannot be procured. *Isi lo hiciere sin escribano publico que sean ai, a lo menos, cinco testigos, vecinos, segun dicho es, si fuere lugar donde los pudiere aver: i si no pudieren ser avidos cinco testigos ni escriuano en el dicho lugar, a lo menos sean presentes tres testigos vecinos del tal lugar, &c. Rec.* 5, 4, 1.

It is then only in cases in which the will is made in places so thinly inhabited, *si locus sit ita desertus*, as Gomez says, that no more than three witnesses can be had, that a will, with that number, is valid. 1 *Febrero*; 1. § 19, n. 205. *Covarrubias*, 1 *Opera omnia, ch.* 10, *n.* 1, 2. *Gomez L.* 3 *de Toro, n.* 47, 3, *Azevedo Recop.* 5, 4, 1, *n.* 23.

The only point, in which the Spanish jurists appear to have differed, in the construction of the law of the recopilation cited, is in regard to the notary mentioned therein. Covarrubias and Gomez held that if a will was made in presence of three witnesses only, in a place in which a greater number could not be procured, but in which a notary could have been had, it was valid, while Azevedo maintained the contrary; contending that no distinction could be made, where the law has not made any. His opinion, according to Sala, a modern Spanish writer, seems to have prevailed. 1 *Derecho real de Espana*, 2, 4, *n.* 5.

Neither is the will valid, as an oral one: for the same number of witnesses is requisite in wills of this kind. 1 *Febrero, anadido* 1, § 1, *n.* 4, *id.* § *final.*

If it be considered as a private will, it is void on another ground; as it was not signed by the testator, nor by any person for him. *Partida* 6, 1, 1.

3. The defendant cannot have acquired, by the prescription of ten, nor that of twenty years, the estate of the testator, because these prescriptions do not avail a possessor without title, nor with one void in its form.

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In order to invoke either of these prescriptions, in regard to immoveable property, it is necessary, besides a possession in good faith, that there be a title transferring the property, as a sale, donation or will. *Part.* 3, 29, 18.

The will in this case is not such a title, because it was not proven, and possession decreed under it, contrarily with the heirs at law, who had an interest in contesting it.

The instituted heir cannot, of his own private authority, take possession of the estate devised to him, when there is an heir at law. If he does, he forfeits his right. *Recop.* 4, 13, 3.

A will cannot be executed before it is proven before the judge: and the Spanish law did not distinguish, in this respect, the will received by a notary, from that made before witnesses. *Part.* 6, 2, 4.

As it does not appear that the defendant was sent into possession by the judge, the presumption is, that she took it of her own authority. She can only prescribe, as those who possess without a just title, viz. by the prescription of thirty years.

Further, the will could not be valid as a private one, without being proved by the subscribing witness; a proof which does not appear

ever to have been made. So it cannot be said that the defendant has a title, enabling her to avail herself of the prescription of ten and twenty years.

Whilst she was without a title, it is immaterial whether she believed she had one. A putative title cannot support a prescription. *Falsus vel opinatus titulus non est titulus? Clef des Lois Romaines, 863, verbo Prescription, ff. 41, 3, 27 & 29, 6 Hulot, 330.*

It is true, error on the part of another may render a putative title sufficient, but the law has expressed in what cases. *Clef des lois Romaines, loco citato, ff. 41, 10, 5. 1 Domat. 1, 3, 7, § 4, l. 14. Partida 6, 14, 7.*

The prescriptions of ten and twenty years cannot avail, because the will, under which the defendant's title rests, is void in its form.

Generally, a void title cannot support a prescription: for it is as no title. *Pothier, Prescription, n. 85, La Porte, 25, 26. C. 8, 33, 7. 3 Hulot, 218.*

The principle is the same in the Spanish law. Gregorio Lopez in his third note, on *Part. 3, 19, 18*, treating of the prescriptions of ten and twenty years, asks whether one may prescribe in a void title. *An titulus nullus prosstat jus-tam causam prescribendi?* According to an

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author, whom he cites, he answers in the affirmative; adding, but, by conforming one's self to the dispositions of the law 14 in the same title. It is, however, apparent that there is a typographical error: he intended to refer to the 15th law, for the 14th does not mention at all the void title, while the former expressly treats of the possession of a thing, under a legacy, in a will in which irregularities might exist. It is then according to *Part.* 3, 19, 15, that we must understand Lopez. This law mentions only moveable property held under a void or irregular will; we cannot then, without going beyond its expressions, extend what Lopez says of prescription under a void title, to immoveable property, as the lot, which is the object of the present suit.

In this respect, the consequence, drawn from Lopez's opinion, is conformable to the principles of the French and our laws, which do not consider the prescription of moveable property as sufficiently important to be submitted to the rules established in regard to the prescription of immoveable property. *La Porte*, 87. In our statute, the rule that one cannot prescribe under a void title does not prevent the *bonâ fide* possessor, without title, of acquiring the fruits of the estate claimed from him. *Civ. Code* 103, *art.* 6, 481, *art.* 30, 489, *art.* 70.

Will it be contended that the *Part.* 6, 14, 7, provides that the instituted heir, who has possessed in good faith, may prescribe in ten years, among present, although there exist a posterior will? We admit that there are exceptions to the general principle in this case, as that which has been cited to the one which disallows prescription, under a putative title. We have shewn the rule of the Spanish law, and only contend that the exceptions must be likewise shewn and ought not to be extended.

Let it be noticed that the case, in which a putative title may be the basis of a prescription, cited in *Part.* 6, 14, 7, is not that of a title absolutely void under the general rule, but which is avoided by a posterior will. The law incapacitates from being the basis of a prescription, the title, void on account of its irregularity in point of form, false, or illegal, on account of the incapacity of the instituted heir. A will revoked by a posterior one, the existence of which is unknown, may nevertheless be regular in its form, and it is such a will the law is speaking of. For if the first will, besides being revoked, was void in point of form, there cannot be a doubt that the law cited would not enable one to prescribe under it, in regard to immoveable property.

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The quotation from *Gregorio Lopez*, and the expressions of the *Part.* 3, 29, 15, shew that the nullity of a title, which renders it an obstacle to prescription, as to immoveable property, without being so in the case of moveable, is that resulting from a defect of form which renders it irregular and illegal. "Men," says the law, "make legacies of moveable things, in a will which is not valid according to law, or make such a legacy by a will and revoke it by another," &c.

A nullity in point of form is meant, when wills are spoken of, which are not valid according to law, or the incapacity of the legatee or instituted heir, as we may see by and by. In order to prescribe, says Sala, there must be a legal reason, a real and existing rule. *Derecho razon, el titulo debe existir real y verdaderamente.* 1 *Derecho real de Espana* 116, 2, 2, n. 3 & 4. *Usucapio, non precedente vero titulo, procedere non potest. C.* 7, 29, 4. 3 *Hulot*, 210.

The Roman law has a striking example of the principle that an illegal title cannot be the basis of a prescription in the case of an adopted son, cited in *C.* 7, 33, 8.

Lastly, we have a positive text in law, which silences discussion: a provision that when a title is defective, with respect to form, it cannot

become the basis of the prescription of ten and twenty years. *Civ. Code* 188, *art.* 70.

Although the will and death of Carrel, in 1806, be anterior to the promulgation of the Code, in 1808, we contend that its dispositions must regulate the prescription invoked by the defendant. Prescriptions do not result from contracts, but from the mere disposition of the law. The legislature then which establishes a prescription may establish rules in relation to it, and violates or infringes no contract by the extension of the time required: or in making the acquisition of it to depend on circumstances or conditions more favourable to the proprietor. The defendant, if she ever could prescribe, according to the laws of Spain, under a title null in its form, did not actually do so, although the period of prescription began to run. If before its completion a new law abrogated the former, and prevented a prescription under a title null in its form, it is not easy to see on what grounds she may contend that she can prescribe in spite of the new law.

As to the defendant's incapacity, on the score of concubinage, to inherit to the prejudice of the testator's brother and sisters, the law is so plain, that it suffices to refer thereto. *ff.* 41, 6, 4, 15 *Rodriguez* 164. *ff.* 41, 9, 9, 15 *Rodriguez* 73.

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The reason why the nullity in the form of an act is fatal to prescription, is that the possessor cannot alledge his ignorance of an apparent defect. *Ignorantia juris non excusat.* 2 *Chf des lois Rom.* 363, *verbo Prescription, ff.* 41, 3, 31, 6 *Hulot* 332.

Hennen, for the defendant. The plaintiffs' brothers and sisters of the whole blood of Joseph Carrel, deceased, claim his estate from Magdalen Cabaret, the defendant, instituted his universal heir by a will made the 25th of September, 1806, before a notary public in New-Orleans, on two grounds.

1. Magdalen Cabaret, the universal legatee, lived in open and notorious concubinage with their brother, previously to, and at the time of his death; and she is, therefore, infamous, and unworthy to be instituted heir.

2. The will itself is null; and though approved by the court of probates, on the 4th of October, 1806, at the request of the executor, conferred no right to their prejudice.

I. The plaintiffs, in their petition, have united what was considered as two actions in the Roman and Spanish laws; the *actio inofficiosi testamenti*, which embraces the first ground; and the *petitio haereditatis*, which embraces the

second: both, however, permitted, under the provisions of our statute, to be instituted at the same time.

The *actio inofficiosi testamenti* is admitted by the Spanish and Roman laws, in favour of ascendants and descendants, disinherited, except in the cases stated in *Partida* 6, 7, 4, 7 & 11. But it was required that the heir should be expressly disinherited, *totidem verbis*, and the cause mentioned in the will. *Partida* 6, 7, 10. A testator, however, leaving no ascendants nor descendants, could disinherit his brother without giving any reason for it in the will: and no express words were necessary to effect it. *Dezimos, que el hermano puede desheredar al otro con razon, e sin razon. E aunque non fiziese mencion del en el testamento, puede dexar lo suyo a quien quisiere, quando no ouiere fijos, nin otros que descendiessen del de la lina derecha, nin padre, nin abuelos; fueras ende, si estableciesse por su heredero a tal ome, que fuesse de mala vida, o enfamado. Partida*, 6 7, 2, The same provisions are made in *Partida*, 6, 8, 2. *E como quier que non faga emiente del hermano en el testamento, nin le dexe ninguna cosa de lo suyo, non le pertenece al hermano, de fazer querella del testamento que el otro su hermano ouiesse fecho, nin la*

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puede quebrentar. Fueras ende, si aquel que fuesse establecido por heredero, fuesse ome de mala fama.

The only difference in these two laws is, that the last forbids the institution of an heir of bad fame, *mala fama*, and the latter, an heir of bad life, or infamous, *mala vida, o enfamado.*

The plaintiffs contend, that a concubine is embraced in the above description of persons; and to that point, opinions of Spanish commentators have been cited.

In reply to this, I observe that all these commentators refer to the Roman or cannon law, in foundation of their opinion; and no one of them founds his opinion upon the words of the text. In fact, the only semblance of such an opinion, in the text, is to be taken from the words, *mala vida*, which, it is evident, are used as synonimous with *mala fama* and *enfamado.* The conjunction, *o*, is used for the very purpose of explaining the preceding words, *mala vida:* in the latter part of the law itself, *Partida* 6, 7, 12, where it was necessary to make the same specifications, the words, *mala vida*, are omitted, and the word, *enfamado*, only used. In the *Partida* 6, 8, 2, the same provisions are likewise repeated, and the word, *enfamado*, only used. For these reasons only, I would conclude that

the Spanish commentators quoted, are incorrect when they consider the provisions of the Roman code, or canon law, as embraced by the above laws of the Partidas. But a more convincing proof of their error is drawn from the 4th Partida, 14th title, where are mentioned the different descriptions of women, other than wives, with whom men may live without any temporal punishment, though they commit a mortal sin. In the three laws of this title, various provisions are made respecting *baraganas*, concubines; and it is expressly declared that it is lawful for a man to take such an one: nay some men, in some cases, are restricted to them and forbidden to marry. Assuredly then such persons cannot be infamous in law, whatever opinion we maintain of their moral character; nor be disabled from taking as legatees by the very same laws which recognize their existence.

Should I however err in my interpretation of the laws of the Partidas on this subject, yet the action *inofficiosi testamenti* is barred by five years. The defendant has plead prescription generally to the petition of the plaintiffs: and more than ten years elapsed between the time the defendant took possession of the testator's estate, and the institution of the suit. In the *Partida* 6, 8, 4, is found this prescription of five

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years. *Dezimos, que si alguno que fuesse desheredado, callasse fasta cinco anos despues que el heredero ouiesse entrado en la heredad del testador, que de los cinco anos en adelante non se podria querellar: e maguer se querellasse, queriendo mostrar razon per que non devia ser desheredado, non dever ser oyido.* The same prescription is stated in 1 *Sala* 176; 3 *Rodriguez, Digesto*, 64, 95; and in the codes of Theodosian and Justinian. *Codex Theodosi.* 2, 19, 5, with the Paratille and note of D. Godefroy. *Pothier's Pandects of Justinian, l.* 5. *t.* 2, *no.* 51. *ff.* 5, 2, 28, § 1.

II. Thus much for the *actio inofficiosi testamenti*: as to the second ground on which the plaintiffs claim, averring the will to be null and that the probate thereof gives no right to the defendant. I answer, that from a careful examination of the text of the *Novisima Recopilacion, (lib.* 10, *tit.* 18, *l.* 1,) where we have all the formalities requisite in making wills, it does not appear that any one of them was omitted in that of Joseph Carrel.

1. It is no where said, not even by a single Spanish commentator, that the will must be in the handwriting of the notary. On the contrary Febrero directly tells us that the testator may

write the will himself, particularly if he is a foreigner, and in case he cannot write, it may be done by a person acquainted with his language: in both which cases the notary and witnesses have only to sign the writing. *Febrero, edit.* 1817, 1, 1, *n.* 270.

2. It was not necessary that the witnesses and notary should all have been present at the same time when the testator declared to them his will: it is even usual for the notary to write down the will from the dictation of the testator in the absence of all witnesses. *Febrero, ibid. no.* 275. And if the testator at any time before or after the will was reduced to writing, declared it to the notary, it is valid on the same principle. But supposing the will to be void, for the reasons (not appearing on the face of it) that have been alledged by the plaintiffs, even then they cannot maintain the present action; it is barred by the lapse of ten years.

The good faith of the defendant is admitted; indeed it could not have been disputed; she had every just reason to believe the will good and her possession of the estate of the testator legal, when the court of probates had approved of the will and authorized the executor to discharge the legacy it contained. *Civil Code* 103, *art.* 7. But the plaintiffs contend, that as the

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will is null, it cannot be the basis of the prescription of ten years: they formed their doctrine on the 70th article of the *Civil Code*, page 488, which is as follows: *When a title is defective with respect to form, it cannot become the basis of the ten or of the twenty years prescription.*

On this article I observe, that there may be null titles which however may serve as a basis for the prescription of ten and twenty years. Let us take the example, put in the *Partida* 3, 14, 7, of a person instituted heir by a will subsequently revoked, though unknown to the heir. In this case, if the heir has been in possession of the estate ten years, not knowing that the will had been revoked, he acquires a good title to the property against all claimants who were present. Such is the provision of this law of the Partidas, and such would be the decision under our own code. There, though the nullity of the title is incontestible, it is not apparent on the face of it. The will was not defective with respect to form.

What then is the limitation to be affixed to this general principle of our code? Plainly that affixed in the text; a defect of form, apparent on the face of the title: not a nullity to be established by proving facts which contra-

ample of a will made by a testator *non compos mentis*: such will would clearly be void; yet, if all requisite forms were pursued in making it, legatees, in good faith, would acquire a valid title under it by prescription.

But, further, there may be titles defective in form, and the defect appearing on the face of them, and yet serve as a basis for prescription under certain circumstances. Our own code, page 303, art. 204, will furnish us with an example. A married woman, without the authority of her husband, disposes of a plantation, her dotal property; such act would be void: yet if she does not claim it within ten years after the death of her husband, the purchaser would acquire a good title thereto by prescription. We may then safely conclude that a very extensive limitation is to be put on the general terms of the code: but where is the limitation to stop? The limitation then I state to be this, that wherever the act, against which a nullity of form is alledged, may be ratified by a new consent, or regards only individuals and not the public, in all such cases, if the nullity is not insisted upon during ten years, it is too late to do it after that lapse of time. 2 *Cotille* 439—41. There is another point of view in which the possession of the defendant may be placed,

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which will shew most conclusively that she had gained the estate of J. Carrel by prescription. The plaintiffs, the brothers and sisters of the testator, all residing in the same district, within a few miles of each other, could not have been ignorant of his death: they state in their petition that they knew of the possession of the estate by the defendant. The executor of the will, it is to be presumed, did his duty before he delivered the estate to the universal legatee of the testator. He required then the consent of the heirs, the present plaintiffs, to this delivery; for such was his duty, 5 *Pothier's posthumous works*, 12*mo*. 293: nay, it will even be presumed, after the lapse of ten years, that he formally cited them to be present at an act so immediately affecting their interests. *Ville Gloss. no.* 2 *of Gregorio Lopez, on Partida* 6, 2, 4, *Sufficit longum tempus, id est decennium, ut praesumatur ista solemnitas intervenisse.* Under these circumstances the plaintiffs are totally barred from any action: the defendant has acquired a complete title, however defective or null it may have been in its commencement. This I prove from the *Partida* 3, 29, 19. *Sabiendo, o creyendo ciertamente, el que enagenasse cosa que faesse ruyz, que non avia derecho de lo fazer, estonce aquel que la recibiesse*

del, non la podria ganar por menor tiempo de treynta anos; fueras ende, si el senor de la cosa, que avia derecho en ella, supiesse que enagenava, e non la demandasse, del dia que lo supiesse fasta diez anos, seyendo en la tierra, o fasta veynte anos, seyendo en otra parte. Ca estonce ganar la ya por el uno destos tiempos. A law agreeing with the 119 *Novel. cap.* 7, and the authentic of the code 7, 331. The law of the Partida, supposes a case much more unfavourable than that of the defendant, but after a silence of ten years, the true owner, if cognizant of the alienation, loses all his rights, and the possessor acquires a good title. On the same principle our Civil Code, 303, *art.* 204, limits the action of nullity to ten years. Silence for such a length of time is properly considered as a ratification in whatever form it was made. See also the same reason given, 2 *Clef des lois Romaines*, 360.

Our Civil Code, 5, *art.* 16, gives us a good rule for interpreting doubtful or ambiguous expressions in laws; which is, to compare the different parts with each other, and thereby to reconcile them, wherever it can be done. It is necessary, also, to limit general expressions and provisions in such manner as not to destroy particular ones. With the limitations and ex-

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planations which I have given from Colliie of the 70th art. page 189 of the Civil Code, we reconcile it, with art. 208d, page 303, and put the whole in harmony with the 3 *Partida*, 29, 19, which has not been abrogated or superseded by any provision of our statutes.

Wherever the defects in form of a title, or its nullity, is known to those who wish to take advantage thereof, it must be done within ten years, or they lose all their rights. *Vigilantibus, non dormientibus, subveniunt leges.*

The counsel for the plaintiffs, in answer to these authorities and principles which are incontestible, oppose the opinions of Pothier, that a null title cannot serve as the basis of prescription, and that error in law destroys good faith. *Pothier, Prescription, no.* 29 & 85, supported by various quotations from the Roman law. It is not my business to reconcile Pothier with our Civil Code and the Spanish law; nor with the 119 *Novell.* 7 *chap.*, which I believe may be done: I have only to shew what is the law of our own state, found in our statutes, or the Spanish code; and if Pothier or the Roman lawyers have entertained other opinions, they cannot control the decisions of the supreme court of Louisiana.

I would, however, ask of the advocates of the

plaintiffs, what was the error in law of the defendant; and where are the defects in form of her title? Point them out, put your finger on them. Did the defendant err in her opinion of law, when she believed she might, though the concubine of Joseph Carrel, be instituted by him universal heir to his estate, to the prejudice of brothers and sisters of the whole blood? Be it so: does not the law, however, limit your action in such a case to five years?

Where are the defects in form of the defendant's title? The will was not made in presence of the notary: you prove that; but as far as form is concerned, the will states it was made in the presence of the notary and the witnesses. The form is right; but the fact contradicts it. And here it is, gentlemen, that your erroneous opinions of law have taken their origin. You have mistaken a nullity in substance for a nullity in form. Pothier may have led you into this error; for he speaks of null titles in general; and does not limit their nullities to those of form, as is done by our civil code. Let the court take the will of Joseph Carrel, certified by the notary, without any of your evidence to contradict it; there will appear no defect of form on its face; and this court must consider it, as the court of probates did, a valid, legal will.

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You are guilty, gentlemen, of a palpable contradiction in terms when you extend the meaning of a defect in form to a defect in substance. These two kinds of defects are as intelligible and distinct as latent and patent ambiguities in the will itself. The one class are apparent from the writing; the other must be shewn by evidence. I repeat it, the will of Joseph Carrel is not null for defect of form; if it is null, it is because the form is contradicted by evidence. Had this will been forged, as was insinuated, and no defect of form been apparent on the face of it, the legatee, being in good faith, would have prescribed under it, though null, because forged.

Where there is error in fact, it is admitted on all hands, prescription runs. Well, now, what more was there in this case? An error in fact only; an error too, let it be observed, produced by a judicial act, the homologation of the will of the testator by the only tribunal to which it could be referred, the court of probates: all this, moreover, known to the plaintiffs, without a word of disapprobation or opposition on their part. Their silence alone was a sufficient fact for the defendant, on which to ground her belief that the title under which she claimed was good. The putative, and the null title, at

well as the null judgment, where there is good faith, are each a sufficient basis to form prescription, as we are informed by the Spanish commentator, Gregorio Lopez, *Gloss.* 3, on the *Part.* 3, 29, 19. The counsel for the plaintiffs, aware of this opinion have made a very blundering explanation of it. They make Lopez say that this is to be understood with the explanations of the 15th law of the same title. But his words are very plain, *que dixi*, what *I have said*, not what the law says; on the 14 *l.* of this title: nor is there any error in the ciphers as the counsel suppose; different editions of the Partidas, which I have compared, agree; and if there was an error, it would not avail them; it is still, *what I have said*, not what the law says.

While I am on the errors and mistakes of the counsel for the plaintiffs, I cannot forbear to remark on a very glaring one: that concubines could not receive a legacy by the Roman law. Let us read the Pandects, 25, *De concubinis*, and we will find that they had many legal rights. And it is said expressly that they can take by legacy. *ff* 32, 1, 41, § 5, 34, 9, 16, § 1. *Dig. lib.* 32, *t.* 1. 5 *Hulot's translation*, 97. 4 *Dict. du Digeste*, 96; *Dict. Digest*, 388. *Taylor's civil law* 278, 2, 7 *Heineccii Opera*, 184, 187. To which might

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be added many more. Another error is, that it was necessary for the defendant to be put in possession of the testator's estate by the order of the judge.—No such thing; the executor had the right, and it was his duty to put the defendant in possession (*Partida* 6, 10, 2, with the gloss of *Lopez n.* 1) if no opposition was made on the part of the heirs.

I admit that our statute must furnish the rule for determining whether prescription has accrued in this case; and I rely with perfect confidence on the provisions of it. *Civ. Code* 303; *art.* 311, *art.* 240, 187, *art.* 67.

I hope enough has been said to shew the court that the action of the plaintiffs is not sustainable, and that the defendant's title by prescription is good. I think it, therefore, unnecessary to say more than a very few words on the subject of some facts which were drawn up on the part of the defendant's counsel to be submitted to the jury, and rejected by the judge. Had the defendant been permitted to prove these facts, the present appeal would have been easily determined.

1. The plaintiffs cannot recover the estate from the defendant, before they reimburse all sums paid by her for the testator, (*Partida* 6, 14, 36. 5 *Rodriguez's digest*, 119) nor until

they pay her what the testator owed her, *idem, ibid.* and what she contributed towards the purchase of the lot.

2. The executor delivered the estate of the testator to the defendant, with the knowledge, consent, and approbation of the plaintiffs; they are, therefore, barred in the present action. *Civil Code* 314, *art.* 340. 1 *Sala*, 176. 2 *Rodriguez*, 106. *Partida* 6, 2, 6. *Partida* 3, 29, 10.

3. Good faith and the belief that the defendant was owner, were also proper facts to go to the jury, *Pothier, Prescription*, no. 96.

4. The delivery of the testator's estate by the executor, was another fact proper for the jury to find. It has been said that the defendant took possession of it violently, without the consent, acquiescence and approbation of the plaintiffs; surely then, it was a proper fact for the jury to pronounce on.

Derbigny, J. delivered the opinion of the court. In the discussion of their respective means of defence, the parties have taken a most extensive range. But although due attention has been paid to their arguments, we find no necessity, for the decision of this cause, to inquire into any other points than the following:

1. As an action *inofficiosi testamenti*, is this

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claim barred by the silence of the plaintiffs during five years?

2. Is the defendant's title one on which prescription could run?

1. Heirs in the direct, descending or ascending line, may be disinherited for cause assigned; collaterals with or without cause. No distinction is made in the Spanish laws, between the express disinherison of the heir at law and the mere omission of his name in the will; both are called disinherison: *un hermano puede desheredar al otro con razon é sin razon. Part.* 6, 7, 12. Against the disinherison, the heir at law may claim within five years, after the instituted heir has taken possession of the estate: past that time he cannot. *Part.* 6, 8, 4. Is this law applicable to the present action? An attentive perusal has convinced us that it is.

The law begins by saying that there are many reasons for which the disinherison cannot be removed: "as when the heir instituted proves that the heir at law was really guilty of the act for which he is declared to be disinherited; and this takes place whether the heir at law be a descendant, an ascendant, or a collateral." So much of the law is, of course, applicable only to cases where the disinherison is for cause assigned. But what follows is incon-

ported with the preceding part: "We moreover say that if a person, who has been disinherited, remains silent and does not complain for five years after the instituted heir has taken possession of the inheritance, he shall not thereafter be heard, though he should offer to shew why he ought not to have been disinherited." This provision is a general one; we cannot undertake to say that it was intended to apply only to cases of disinherison for cause assigned. The plaintiffs, however, contend that the case of disinherison without cause is not comprehended within the purview of this law. Let us see if any good reason may be found in favor of that interpretation. Disinherison, without cause assigned, can take place only against collaterals; and the law gives them no relief against it, except in one case, and that is, where the instituted heir is infamous, and the heir at law a brother of the testator. We do not mean here to examine whether the defendant be one of those persons whom the Spanish laws deem infamous; but taking it for granted, we say that to support the construction of the above law as, insisted on by the plaintiffs, the institution of the infamous person should be absolutely void; for then, no application being necessary on the part of the heir at law to have it avoided, no

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lapse of time would be fatal during which he might neglect to bring suit against the instituted heir. But the institution of an infamous person as heir is not absolutely void, it is only voidable: *el hermano puede quebrantar el testamento, probando esto ante el judgador*; "the brother may have the will annulled, on proving the fact before the judge;" and in *law* 2, *tit.* 6, *seyendo el heredero tal como sobredictoes, estonce bien podria el hermano querellarse ante el juez, é quebrantar el testamento en que fuesse establecido por heredero.* "The heir being such as is abovesaid (infamous) the brother may bring his complaint before the judge, and cause the will to be annulled, in which such heir is instituted." Finally, it is certain that the infamous character of the instituted heir does not make the institution absolutely void, that the disinherited brother cannot even complain of it, if he is himself guilty of any act against the testator, by which disinherison is incurred: *Pero si este hermano sobradicho hubiesse fecho contra el testador alguna de las cosas porque los hermanos pueden ser desheredados, segun diximos en el titulo de los desheredamientos, estonce non se podria querellar, sin desatar el testamento del harmano.* The defendant, therefore, if the plaintiffs had brought their action against her

within the five years, might have repelled it, by proving that the plaintiffs were guilty of some one of those acts; and if she had succeeded, she would have had judgment in her favour What then, if they said nothing during five years? Why, the will must remain valid in the same manner as a disinherison, for cause assigned will be maintained, if not attacked within that time.

But the plaintiffs say that, supposing their action *inofficiosi testamenti* to be barred according to the above quoted law of the Partidas, that provision is repealed by the *law* 6, *tit.* 15, *book* 4, of the *Recopilacion de Castilla*, which fixes general rules for all kinds of prescriptions of actions. It is a principle well known, and which this court has recognized on several occasions, that general provisions do not repeal special laws, when these may subsist without clashing with them. We think that the prescription of five years established by the *law* 4, *tit.* 8, *part* 6, against the action *inofficiosi testamenti* is not repealed by the *law* 6, *tit.* 15, *book* 4, of the *Recopilacion*, which provides generally, that personal actions shall be prescribed by twenty years, and actions real or mixed by thirty.

It is too late, then, for the plaintiffs to avail themselves of the action of inofficious testament;

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let us see whether they can succeed on the other ground, the nullity of the will on account of the omission of some solemnity required by law.

II. For the decision of this point, attention must be had to the present situation of the parties. The defendant was in possession of the late Joseph Carrel's estate since more than ten years when the present suit was brought. The will was her title, and under it she may have prescribed, provided that title was a just one and she a possessor in good faith, for all the distinctions resorted to by the plaintiffs upon this point, will, on examination, be found to centre in that "a just title and good faith."

Much labour, in the opinion of this court, has been wasted in proving that this will was not, in reality, such, as it appeared to be on the face of it; that an instrument outwardly perfect in its form, had, in fact, not been executed as it purported to have been. When the law says that a title defective in point of form shall not be the basis of prescription, what does it mean? A title, which, though apparently good, has some latent defect? Certainly not. A title which, though apparently clothed with all the formalities required by law, may be proved defective by extensive evidence? No. It means

a title, on the face of which the defect is stamped. And why? Because the holder of such a title cannot pretend that he possesses in good faith; for he is supposed to know the defect of form which his title shews, and cannot plead ignorance of law. But admit latent nullities, unknown in point of fact to the possessor, to prevent prescription, and what does good faith avail him? Or rather what becomes of the whole doctrine of prescription?

But if the ignorance or the misconduct of the notary, from which it results that this will was in reality null, protects the defendant, the plaintiffs say that it is not so with respect to a defect which she must have known, to wit, her own incapacity to inherit from Joseph Carrel. It is true, that, if the latent defect is known to the possessor, he cannot prescribe: why? Again, because he does not possess in good faith. I may contract with a madman, believing him to be of sound mind, and prescribe under such a title, notwithstanding its absolute nullity: *si a furioso quem putem sanæ mentis emero, constitit usucapere utilitatis causâ me posse, quamvis nulla est emptio. (l. 2. § 16. ff. pro empt.)* But if I knew him to be mad, I cannot prescribe under pretence that I was ignorant of his incapacity to contract. So here, the defendant was

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the concubine of the late Joseph Carrel; if the law had provided that the institution of such a person as heir was absolutely void, she could not plead ignorance of her incapacity to inherit. But the law, as we have seen, is very different. Far from making the institution void, it has made it only voidable, at the suit of the brother, and by him only in certain cases; and it has provided that if the disinherited brother remains silent five years, he shall not thereafter be heard. The defendant was capable of inheriting: her title was good, provided the plaintiffs acquiesced in it by their silence. At the end of five years, she could prescribe under a will in every respect valid: at the end of ten, she has prescribed under a will apparently perfect in point of form. The objection of the plaintiffs to this will as a just title, on which prescription would run, does not appear to us of sufficient weight to require any particular consideration.

It is, therefore, ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed, and that judgment be entered for the appellant with costs.

DURNFORD vs. SEGHERS' SYNDICS

APPEAL from the court of the first district.

The proceedings of the meeting of the creditor of an insolvent are irregular, if in the French language.

MARTIN, J. delivered the opinion of the court. The petitioner instituted this suit, as one of the creditors of the insolvent, in order to set aside the proceedings of the meeting of the creditors, on the ground that they were recorded in the French language. The district court having accordingly set them aside, the syndics have brought the present appeal.

It appears to this court that the decision appealed from is perfectly correct. The proceedings of the meeting of the creditors, of an insolvent, are judicial proceedings. They are ordered by the court, and constitute a part of the proceedings in the suit, instituted by the debtor against his creditors, and are the basis on which rests the judgment which terminates it. They, therefore, are a part of those written proceedings which are required to be promulgated, preserved and conducted in the language in which the constitution of the United States is written. *Const. art.* 6, § 15, 1, *Martin's Digest* 114.

It is, therefore, ordered, adjudged and de-

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creed that the judgment of the district court be affirmed with costs.

Hennen for the plaintiff, *Grymes* for the defendants.

KNIGHT vs. *HALL.*

When the property, taken under an order of seizure, is in the hands of a third possessor, judgment must be had against the original debtor.

APPEAL from the court of the third district.

DERBIGNY, J. delivered the opinion of the court. The plaintiff sold to the defendant a negro slave, and took his promissory note, which not being paid at maturity, he obtained an order of seizure on the exhibition of a deed of mortgage, executed by the vendee. It appears that the slave was then in the possession of a third person, Charles Tessier, who had bought him from the defendant, and who made opposition to the sale, and obtained a writ of injunction. In this state of things the cause was set down for trial, and judgment was given for the defendant. The plaintiff appealed.

The record contains all the facts, and nothing appears on the face of it that can enable us to understand the reasons of the decision. The debt is proved, and although the judge may have thought that the plaintiff could not proceed

by seizure, in the hands of a third possessor, without having first obtained a condemnation against the defendant, he ought to have given judgment for the amount of the note, and let the plaintiff have his remedy afterwards against the third possessor, in the manner pointed out by law.

It is, therefore, ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed, and that judgment be entered for the plaintiff, and appellant, against the defendant, and appellee, for the sum of eight hundred dollars with costs, except those of the seizure, which must be supported by the plaintiff.

Turner for the plaintiff, *Maybin* for the defendant.

TESSIER vs. *HALL.*

A parish judge may record his own bill of sale. The thing mortgaged cannot be seized in the hands of a third possessor, till after judgment against the mortgagor.

APPEAL from the court of the third district.

DERBIGNY, J. delivered the opinion of the court. This suit, though carried on separately, is only an incident of the preceding. The plaintiff, claiming to be the owner of the slave seized, applied for, and obtained an injunction

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staying the sale, which injunction was, after the trial, made perpetual.

A question arose on this application which made Tessier's claim appear doubtful. His bill of sale from Knight, the defendant's vendee, was a private one, and had been recorded by himself in the book which he kept for such purposes, as parish judge. Is this such a sale as could affect the rights of third persons? We are of opinion that it is. The object of recording a private bill of sale is to give public notice of its existence. Surely the notary may as well give such notice of his own acts as of those of others: at least, we see no good reason why he should not; principally where it is not possible for him to have it done by another, as is the case with parish judges.

The seizure of the slave, sold to Tessier, and in his actual possession, could not take place without a previous judgment against the mortgagor, and previous notice, according to law, to the third possessor, who had then a right to make his election between paying the amount of the judgment, and abandoning the slave.

It is, therefore, ordered, adjudged and decreed that the judgment of the district court be affirmed with costs, reserving, however, to the

appellant his right as mortgagee on a future application.

Maybin for the plaintiff, *Turner* for the defendant.

WATSON & AL. vs. *PIERPOINT.*

The property of a merchant, who has a store in the state, and is accidentally absent on a voyage to the United States, cannot be attached, as that of a non-resident.

APPEAL from the court of the parish and city of New-Orleans.

The petition stated that the defendant was indebted to the plaintiffs on a promissory note, that he resided out of the state, but had property in it, whereupon process of attachment was obtained, on the affidavit of one of the plaintiffs, and levied on a quantity of dry goods in the hands of the defendant's agents.

A motion was made for a dissolution of the attachment, and witnesses were examined in open court.

Noyes deposed that he knows the defendant, and came to New-Orleans in the same ship with him, on the 9th of November 1818. The defendant has carried on business, as a merchant, ever since that time, and has kept a store in Canal-street, where it is still kept, and left the city for New-York on the 10th of July, 1819,

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leaving his store under the care of his boy, and having appointed W. R. Palmer his agent, with the avowed intention of proceeding to New-York on business, and returning in the fall, and it was so understood by his neighbors.

W. R. Palmer, having heard the above testimony, deposed he believes the facts to be true: that he expects the defendant every day, and believes he would have been back before the present time, had he not been prevented by the sickness prevailing in New-York.

The parish court dissolved the attachment, and on the appeal,

Workman, for the plaintiffs, assigned for error, that the attachment was dissolved, although it appeared in evidence, as it does now appear on the record, that, when it was laid, and long after, the defendant was absent from the state.

MATHEWS, J. delivered the opinion of the court. This is a case in which the plaintiffs obtained an attachment against the property of the defendant, who was absent from the state. The attachment was afterwards dissolved, on the disproval of the facts by the latter, in conformity with the provisions of our attachment laws, whereupon the plaintiffs appealed.

In support of this action, in its present form,

the appellants contend that any kind of absence of the defendant from the jurisdictional limits of the state will authorise a proceeding by attachment against his property. They rely on the act of the territorial legislature, in 1807, which provides that "in all cases, when an attachment is prayed for, against a debtor, absent from the territory, the plaintiff shall, previous to his obtaining the attachment, give bond, &c." 1 *Martin's Digest*, 518, n. 8.

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This law must be taken and construed in conjunction with the other acts on the same subject. It seems to have been intended for the benefit of the defendants, in cases of attachment, and does not enlarge the privilege granted to the creditor, in case of the absence of the debtor.

The kind of absence or rather non-residence, on which an attachment may be supported, is well defined in the act of 1805, § 14, 1 *Martin's Digest*, 512, n. 1, and in our opinion does not embrace the present case.

It is, therefore, ordered, adjudged and decreed that the judgment of the parish court be affirmed with costs.

Workman for the plaintiffs, *Morse* for the defendant.

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Dunn & wife
vs.
Vail.

The marshal of the United States is suable in a state court for a trespass committed under color of an authority, under a process issued out of a court of the United States.

DUNN & WIFE vs. VAIL.

APPEAL from the court of the third district.

The defendant was charged with the wrongful taking and detention of a slave of the wife, and the plaintiffs prayed he might be decreed to restore the slave, pay damages for the wrongful taking and detention, and be enjoined in the meanwhile from selling or otherwise disposing of the slave.

He answered, that as deputy marshal of the United States, for the Louisiana district, he took the slave, named in the petition, by virtue of an execution issued out of the court of the United States, for that district, against the husband in whose possession the slave was found. He pleaded to the jurisdiction of the state court, denying its authority and jurisdiction over him, as deputy marshal of the United States, and its power to suspend, arrest, or in any manner interrupt the proceedings of the court from which the execution had issued. Lastly, he denied the slave to be the property of the wife, and averred it to be that of the husband.

The district court gave judgment that the plea to the jurisdiction be sustained, and the proceedings dismissed, for want of jurisdiction, at the plaintiffs' costs. They appealed.

By the statement of facts, which was signed by the counsel, it appeared that the only point acted upon in the court *à quo*, was the plea to the jurisdiction, and the only pieces of evidence adduced were a commission from the marshal of the United States for the Louisiana district, appointing the defendant his deputy, and a writ of *fieri facias*, issued out of the district court of the United States for that district against the husband.

Turner, for the plaintiffs. Three questions present themselves for consideration.

1. Has there been such an injury done to the petitioner, in disturbing her in the enjoyment of her property, as affords grounds of complaint before a court of justice? If so,

2. Before what court ought that complaint to be made, as regulated by our state laws?

3. May the court of the United States entertain jurisdiction of suits, similarly situated as this is? If that court cannot, by means of its limited jurisdiction, afford to the plaintiffs relief, in the same manner as the state court could do, then the state court, of necessity, must have power to relieve, without resorting to that court.

I. It is a truth, needing no argument, that

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every person may come before a court with a petition for redress of wrongs.

Our act of assembly concerning the execution of the judgments of courts, authorizes the clerk to issue a writ of execution, directed to the sheriff of any parish in this state, where the petitioner supposes the defendant may have property. That writ commands the sheriff to demand payment of the debt, and if not paid, to make the same out of the personal estate of the defendant; and in default thereof, then out of the slaves and real estate, by the seizure and sale thereof, after advertising the same for a certain number of days. *Acts* 1805—1813, *&c.*

The only authority for making the seizure and the sale is the writ of execution; and it must be levied on the property of the defendant. It cannot be on that of any other. But should the sheriff actually seize and take away the property of another, it is an unauthorized act, for which he is immediately responsible to the owner, as any other person would be, who should unlawfully seize and carry it away.

In truth, the sheriff, who levies an execution, acts at his peril; he must take care not to infringe on the rights, or to intermeddle with the property of third persons: for if he does so, he is a trespasser, and as such, answerable to

that person. *Prevost & wife* vs. *Henney*, 5 *Martin*, 221. 4 *Bac. Abr.* 459. *Sellon's Practice*, 556.

When such an injury has been done, what is the remedy?—It is an action in court to recover the property so unlawfully seized, or the value thereof, with damages for the wrong done. *Sellon's Practice*, 556. *Black. Rep.* 832. 3 *Wilson's Rep.* 309. But, where the action is for the recovery of the property, it would be fruitless, unless the wrongdoer, could be restrained from selling and disposing of it.

This consideration justifies the plaintiff in making him the party defendant, and the court in making an order enjoining the sale of the property, until the rights of the party can be heard and decided on. Unless this mode of proceeding can be maintained as legal and correct, the courts afford only an incomplete remedy for the injury. Shall the plaintiff have a favorite and trusty slave seized and sold for the debt of another, and have no means of preventing it? shall his jewels and his plate, which h has inherited from his ancestors, be seized and sold in an unlawful manner, and he have no means to prevent it?

Certainly our laws cannot be so deficient. There is a remedy, and there is a power to pre-

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vent a change of possession, during the suit concerning the title.

II. The act of 1805, c. 26, § 1, says the action shall be by petition addressed to the court, which shall state the names of the parties, their place of residence, and the cause of action, and conclude with a prayer. The act of 1814, c. 25, § 1, provides "that no person shall be sued in any civil action, in any other parish, but that, wherein he, she, or they, shall habitually reside; any law to the contrary notwithstanding."

It is, therefore, a matter of no importance, where the cause of action originated, it must be instituted in the parish, where the defendant resides.

Executions on judgments may issue to any parish in this state, directed to the sheriff; when, therefore, an execution issues from the court of the district of New-Orleans, to the sheriff of East Baton Rouge, or to the parish of Ouachita, and a contest shall arise between the sheriff of such parish, and a third person, that is, one who was not a party to the execution, concerning the right of property seized by the sheriff, that matter, if it affords cause of action to such person, must, by the law of 1814, be

sued upon in the parish of the residence of the sheriff, which by an article of the constitution, as well as by the civil code, must be the parish whereof he is sheriff. *Const. art.* 4, § 7. *Civ. Code* 12, *art.* 6.

Be it always understood, that for the wrongful act of the sheriff, inflicting injury to the person or property, the action is between him and the person injured: and the plaintiff, in the execution, is not at all involved in these matters.

This subject came under examination in the cases of *Meunier* vs. *Duperron*, 3 *Martin*, 285, and *Prevost & wife* vs. *Hennen*, 5 *Martin*, 221.

But it is a plain principle that he who does the injury, must answer for it, to the person injured.

Now, the consequence of the doctrine, laid down in the district court, is, that, in the case supposed, of the execution from Orleans to Ouachita, that although both the plaintiff and defendant in this new controversy reside in Ouachita, and the property in contest is also there, that the action for redress of these wrongs must be instituted in Orleans; and the plaintiff and defendant, and the witnesses or the depositions are all to be drawn to litigage, and to prove the case at Orleans, three hundred miles from their homes.

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Moreover, if the injured party was to file his petition at Orleans, no process upon it could issue to the parish of Ouachita, to stop the sale, nor to cite the offending party to appear. Because there is no law authorizing it: and because it is inconsistent with our system of courts, and contrary to the express prohibitions of the act of 1814. The sale, therefore, of the property illegally seized, would be made.

If all suits must be brought in the parish where the defendant resides, is there any thing in the nature of this case, which renders that court incompetent?

Reason, justice, and the practice, all conspire to teach us, that questions about the right of property, seized in execution, should be decided in the most summary way, and with the least expense to those concerned.

By the jurisprudence, as practised in England, and in the United States (unless Louisiana shall have a different rule) the right of property seized by a sheriff is tried by a jury summoned *instanter*. If they find it to be the property of the defendant, he may sell it, and that verdict shall excuse him from damages; the owner or claimant can still have his action for the property, or the value of it. 5 *Bacon's Abr.* 186; 1 *Sellon's Practice*, 556, 7.

By the practice in Louisiana, the owner or claimant makes a petition to the judge praying restoration of the property, and an injunction or interdiction to the sheriff to desist from the sale until the right is decided upon.

This is very easy, when the seizure is made in the same parish or district where the execution issued. But will be very difficult, if not impossible, when the seizure is in another district, out of the jurisdiction of the court whence the execution issued. Unless the question of property can be decided by the judge of the district, in which the seizure is made.

If the ancient laws of Spain are inconsistent with our acts of assembly, they are not in force here. If they cannot be applied in their practice to our local institutions, they can have no effect here. None of them but such as harmonize with our form of government, such as are applicable to our system of courts, and such as are consistent with the laws enacted by our own legislature, are in force with us or have any obligation upon, or afford a rule of conduct to, the citizens or courts of this state. The Partidas, if examined accurately, will be found to have no principle inconsistent with those I have advanced, although the Spanish practice may be, and in fact is different in many respects from

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our own; and so far as respects the main question of this case, there is really no difference in principle or practice between the laws of Spain, and those pursued here; saving, however, the prohibition against suing a defendant, out of the parish of his domicile.

The Partida 3, 27, 3, has this provision: "That if, in proceeding to execution, any dispute should arise respecting the right of property about to be seized under execution, as if one should claim it as his own, or that it is not the defendant's: the judge shall take summary cognizance or information of the truth of the fact. And if he finds the opposition well founded, he ought not to seize the property. But he ought to execute the judgment upon other property belonging to the debtor, about which there is no dispute."

Who is the judge here spoken of? Is it he who rendered the judgment about to be executed? It may be so in some cases; and I suppose it generally is he. But then I contend, if it means only him, who rendered the judgment, as to that, the law has no force here; it forms, at most, only a rule to shew what ought to be done in such a case, before the judge, who by our own system of courts ought to hear the opposition, or claim of right to the property, not

"about to be seized," but actually seized and carried away and about to be sold by the sheriff.

I think this would be the interpretation in Spain, in a case like the one now under discussion: and I am persuaded that such should be the practice there, from what appears in the 1st and 6th laws of the same title.

The first provides "that judgments shall be put in execution by the judge, who rendered them, if the thing is in the place." But if it is not in the place, what is to be done? Why the same law proceeds to inform us "that when it is in another place, the judge of that place shall put it in execution, or the judge may order some other to do so, as the Alguazil, &c."

We are, furthermore, informed by the same law, and by the sixth, "that the property seized is to be put into the possession of the plaintiff, to hold until the defendant makes payment of the judgment. But if he will not pay it within a reasonable time, the judge shall permit him to make sale of it: and if no one will purchase, whether through fear or partiality, then the judge may pass it to the plaintiff, at such a price as he may adjudge it to be worth.

Thus we find that it is the judge who puts the judgment in execution: whether it be the

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judge who pronounced the judgment, or the judge of the place where the thing is.

Apply these laws to a case easily supposed. The judge of the first district at Orleans, renders a judgment, which cannot there be executed, because the thing or defendant's property is at Ouachita, then the judge at Ouachita is to execute that judgment.

Now the third law of the Partida above quoted, says, "if, in proceeding to execution, any disputes shall arise about the right of property, about to be seized, &c. the judge shall take summary cognizance, &c. of that matter." What judge is this who is to take summary cognizance, &c.? Is it he, who is about to seize the property which is disputed, or is it some other? I hold that the plain meaning of it, as well the propriety of the construction, shews it to be him, who is putting in execution the judgment.

What is said in *Curia Philipica*, 2, 26, *n.* 2, is evidently taken from the Partida, because it is quoted.

The Partidas are the text of the law, and the Curia is a kind of abridgement, or text book, of the law, as well of the Partidas, as of the Recopilation, &.

Upon comparing them there will be found nothing in the Curia, which in reason, law or

propriety, can vary the law of the Partidas, where both books treat of the same matter; and if there should be any doubt, it will be found principally in that obscurity, which arises from too much brevity in the Curia, and may be explained by looking into the law, more at large, in the Partidas.

Having shewn that, as well by own legislative acts, as by the laws of Spain, the matters in controversy in this case, are judiciable in the third district; and whether any other, or some other court, might have alike jurisdiction of the controversy. I think they can form no ground for denying to that court jurisdiction where the plaintiff has made his election to sue there.

Has that court the power legally to hear the plaintiffs' case, and to decide on their rights, or has it not? This is the question, and I do not find any thing in our laws by which its powers are denied.

That my construction of the law of the Partidas is the correct one, will be found by consulting the commentators on the same law in the *Curia Philipica illustrada*, 2, § 26, *n.* 2, and 2 *Febrero*, 3, 2, § 6, *n.* 359, where it is expressly said that the third opposer shall make his claim before the judge who executes the sentence, and in those cases, where the claim is

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made of the property, on the ground that it is his, and not the defendant's, it shall not only be the duty of the judge, to receive the claim, but he must decide on it, although he acts by the requisition of the judge who pronounced the sentence, because the sentence is not impugned by such claim. But where the opposition tends to annul the sentence, or to make any alteration in it, then the judge, required to execute the sentence shall receive that opposition and send it to the original judge, for him to adjudicate upon.

I beg leave to ask a particular attention to these commentators, because they are so plain and full to my purpose, and the reasons so satisfactory that I am persuaded the court will find that the application of the law of the Partidas has been wrongly made the grounds of the decree of the district court.

Now, as we have no such practice as that in Spain, of the judge executing his own sentence, when it can be done in the place of his jurisdiction, and when it cannot be done there, of sending it to be put in execution by the judge of another jurisdiction, we must come at the remedy in the manner, by our law, best adapted to the end.

If the sheriff had judicial powers, he might stand in the place of the Spanish judge, but he

has not; his are merely executive. His mandate is not from the judge, it is derived from the law, in virtue of his office; the writ gives authority to him, to seize and sell in such and such a case.

In Spain, the seizure is made by the judge, and the property deposited until payment; but, if that is not made in due time, then the judge makes an order for the sale.

But here, the sheriff acts independently of the judge; as soon as final judgment is rendered, in a cause, the judge has done with it.

But the sheriff, like all others, must be subordinate to the court in the district where he resides, and where he acts. It is then to the judge of that district, the third person must apply to have his rights determined; and in doing this, he does not interfere with the sentence rendered in the cause; his complaint is of matters foreign to it; and if his claim is decided in his favor, it has only the effect of restoring to him his rights, and does not in any manner impair those of the plaintiff in execution against the defendant; that judgment is left in full force unaltered, and the execution likewise.

In Spain the judge stays the seizure—he suspends the order of sale until the opposition is heard; and when that is decided upon, he

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either restores the effects, or proceeds with the execution of them, as the case may require. When he returns the property to the claimant, he then proceeds to seize other property, belonging to the defendant, about which there is dispute.

So in our case, the judge of the district, where the property is seized, ought, upon application, to suspend the sale, until he can decide on the claimant's rights. But in doing this, he does not conflict with the jurisdiction of the court, who adjudicated the first cause, neither does he stop the execution of the sentence, nor injoin the execution; he stops only the sale of that specific property which the sheriff has wrongfully seized. But, after this injunction, the sheriff may proceed to sell other property of the defendant, and may sell it and thus satisfy the execution.

III. Has the United States court, from which the execution issued, jurisdiction of the trespass complained of?

From what has already been shewn, it is plain, the contest is a new one, and does not belong to the cause already adjudicated in the federal court.

Febrero, in the number quoted, 359, expres-

ly declares, that the right of controversy about the right of property, claimed by the third person, may be, and ought to be, decided on by the judge, delegated to make execution of the sentence, without transmitting the complaint to the primitive judge, who had adjudicated the cause. Because this new controversy does not import the nullity of the sentence, nor does it tend in any manner to modify it.

By the common law of England, an action of trespass lies against the sheriff for taking property of a wrong person in levying an execution. 4 *Bacon's Abr. tit. Sheriff, n.* 457, 8. *Sellon's practice* 556. 1 *Blackstone's Com.* 345, &c. &c.—Of this there is no doubt.

An action of trover, for the property so taken, will also lie against the sheriff.—Same books, and others.

The courts of the United States are governed by these rules and these principles. This is undeniable. 3 *Cranch*, 337. Case of trespass against a court martial. 2 *Wheaton* 1 *to* 12.

We will now see whether this case can be brought before that court, and if it can, is the plaintiff bound to sue only there?

The act of congress, giving jurisdiction, limits it to those cases, "where the matter in dispute exceeds in value five hundred dollars, and

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where the United States are plaintiffs—or an alien is a party—or the suit is between a citizen of another state; and this jurisdiction is concurrent with the state courts. Here we are to observe that the parties are to be citizens of different states, and one of them must be a citizen of the state where the suit is brought, for if they are both citizens of the same state, the federal court has no jurisdiction.

The courts have been very strict on this point, as may be seen by several cases in Cranch, as well as in other reporters of cases. 1 *Cranch*, 343. 2 *Cranch*, 9—126, 445. 3 *Cranch*, 267, *&c. &c.*

In the present controversy, all the parties are citizens of this state; and, therefore, the federal court cannot entertain jurisdiction of that case: therefore, the court of the third district, by the laws of the United States, was the only court in the world, where the suit could be maintained for the recovery of the property: therefore, the cases was properly brought in the third district, and the plea to the jurisdiction ought to have been disallowed.

Dick, for the defendant. Understanding that this controversy had been settled by the parties, no preparation was made for an argument, on

the point to which it is supposed to give rise. After, however, having heard the observations of the counsel for the plaintiff, I deem no apology necessary, as I cannot conceive that any view, which the most mature consideration could give, would be different at all from that which presents itself.

I will not state the case; it is clearly set forth in the record. The attention of the court will be necessarily drawn to the execution on the judgment of the court of the United States, the petition and answer, and the decree. They present a case, very unlike that which is laboured by the plaintiffs' counsel.

The only question is this: can the state court interfere with the process of a court of the United States? In this case, property has been seized by the marshal to satisfy an execution. A third person interposes and says that it is not the property of the defendant in the execution, and obtains an injunction from a state court to stay the proceedings, until the property can be inquired into. The court, on being made acquainted with the nature of the application, dismisses its own injunction, on the ground of a want of jurisdiction. The supreme court is now asked to reverse the judgment and to order the district court to take cognizance of the ques-

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tion. The plaintiff's counsel contends there is, in all this, no clashing with the powers of the court of the United States—that it does not concern the suit, for that has advanced as far as the judgment, and is at an end; that it does not affect the execution, but only lays hold of the property seized. What is the order of the state court? It enjoins proceedings, under an execution. Now, if an execution has nothing to do with the cause, there is then no interference with the cause, before the court of the United States: and then it follows, that that court sits merely for the purpose of deciding, in the abstract, that a debt is, or is not due, and has no right nor power to secure to the successful party the fruits of its judgment.

Nothing is more important than that all clashing of jurisdiction between the state courts, and those of the United States, should be avoided. In the case of *Diggs* vs. *Keith*, 4 *Cranch*, 179, it is said that a court of the United States, will not enjoin proceedings of a state court. Justice and comity require that the state courts should observe the same rule.

It is attempted to consider this as a question of trespass against the deputy marshal. An examination of the record will not support any such view. I am not prepared to say that an

action of trespass cannot be brought, in a state court, against an officer of a court of the United States. But, here, although something about damages be said in the petition, yet the prayer is that the proceedings be stayed on the execution, and an enquiry gone into as to the right of property. The order of the state judge, granting the injunction, is in compliance with the prayer, and the effect has been to stop the sale of the property, seized under an execution issued out of a court of the United States, and yet we are told that this is no interference with its proceedings.

Turner, in reply. I am ignorant of the grounds, on which the defendant's counsel imagined this cause was settled, and gratified that my argument has placed him so much at his ease.

I have laboured, and I hope the event will shew with success, to present my case to this court as it is made out in the record: a suit for the wrongful taking and detention of my client's slave. My hope of a final judgment in her favor rests on the belief, that I will be able to es ablish the fact.

The defendant has sought to avert the judgment of the district court, by a plea in abate-

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ment, which I trust this court will say was erroneously sustained. If his object was to prevent what he calls an interference with the process of the federal court, the proper course would have been a motion to dissolve the injunction provisionally obtained; but this would have required an affidavit that the slave is the property of the defendant in the execution, which could not safely be made. The counsel declares himself unprepared to deny our right of action, at least for damages, in the court in which we brought our suit. Yet the object of the plea was clearly to defeat our attempt to bring the merits of our case before it.

MARTIN, J. delivered the opinion of the court. It is clear that the plaintiffs had a right to sue for the alledged trespass, and that neither the defendant's commission as deputy-marshal, nor the writ of *fieri facias*, alluded to, can afford him any protection, if the facts set forth in the petition be true.

We do not mean to say, that the injunction obtained, in this cause, can be so enforced as to prevent or delay the execution of the process of the court of the United States; but if, under color of it, the defendant has committed a trespass on the property of a citizen of his state,

he is, in the opinion of this court (DERBIGNY. J. dissenting) suable in her courts, for he is not suable in those of the United States.

It is, therefore, ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed, and this court proceeding to give such a judgment as, in its opinion, ought to have been given, in the district court, it is ordered, adjudged and decreed that the plea in abatement be overruled and set aside, and the cause remanded, with directions to the district judge to proceed to the trial of it, on the merits: and it is ordered that the defendant and appellee pay the costs of this appeal.

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APPEAL from the court of the third district.

This case was almost perfectly similar to the preceding; differing only in the circumstance that the slaves, who were the object of the suit, were not the property of the wife of the defendant, in the district court of the United States, but of another person of the same family name. The same judgment was given.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF LOUISIANA.

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EASTERN DISTRICT, FEBRUARY TERM, 1820.

LEFEVRE *vs.* BARITEAU.

LEFEVRE vs. *BARITEAU.*

A report of referees cannot be used, in another suit, unless it was confirmed.

APPEAL from the court of the parish and city of New-Orleans.

DERBIGNY, J. delivered the opinion of the court. Lefevre, the present plaintiff, was formerly defendant in a suit where Bariteau, the present defendant, claimed a balance of accounts against him. The claim was sent before referees, who reported not only that Lefevre owed nothing to Bariteau, but that Bariteau was indebted to him in a sum of 1235 dollars, 83 cents; that report was made the judgment of the court, so far, as it settled the demand formed in that suit; but so much of it as went to award a balance in favour of the defendant was not confirmed, because the defendant could not recover in

a suit from which he had merely prayed to be dismissed. The present suit is now brought to recover that identical balance, and he offered that same report as evidence of his claim. The defendant objected to its introduction, and being overruled, took a bill of exceptions, on which turns the only question to be decided on this appeal.

We are of opinion that a report of referees, in one case, cannot be used in another, unless it was made the judgment of the court; and consequently that a report confirmed in part is of no force as to the rest. The reasons are obvious and many; but among them the plainest is that, in the case where the reference takes place, the defendant, knowing that nothing further is to be decided than that which is at issue between the parties, may waive any objection to the defects of the report, and suffer it to be confirmed for so much as he considers to be just; but, the greatest injustice might be done him, could that report be afterwards used against him, beyond that which made the judgment of the court, perhaps, for want of opposition.

The report could not be received in evidence, in any shape; it could not be offered as a judgment, for it was no judgment, without the con-

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firmation of the court; it could not be produced as testimony, for the referees, far from being witnesses, act as judges, and hear the testimony of others.

It is, therefore, ordered, adjudged and decreed that the judgment of the parish court be annulled, avoided and reversed; and that this case be remanded to be tried anew, with instructions to the judge not to admit in evidence, in support of this claim, the report of the referees, appointed in the case of *Bariteau* vs. *Lefevre*.

Livingston for the plaintiff, *More* for the defendant.

DEHART vs. *BERTHOUD & AL.*

The court need not give any reason, in a judgment taken by default on a liquidated claim.

APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court. This case is, in all its circumstances, similar to that of *Allard* vs. *Ganushau*, determined in this court, at March term, 1817. 4 *Martin*, 662.

The reasons, in support of the judgment then pronounced, being completely applicable to the present case, it is deemed useless now to repeat them. *Stare decisis* is a convenient and perhaps a sound legal maxim. But, whilst there

is only one decision, which establishes a principle in law, a court of justice, when required, ought to examine the question, without prepossession in favour of its first opinion.

In the case under consideration, we have done so, and cannot discover any good cause to induce an alteration of the construction, given to the constitution and law, in the case cited. The decision in that of *Montserrat* vs. *Godet*, 5 *Mart.* 522, has been referred to, as contradictory to the former; but the apparent inconsistency of the judgments, in the two cases, vanishes on the slightest examination. The latter was an action on an unliquidated demand, wherein the court is bound to interfere and fix the quantum of the debt or damages, and being bound to act, must, according to the provision in the constitution, assign reasons for its judgment; which is not necessary in cases of liquidated claims, on which judgment by default has been taken.

It is, therefore, ordered, adjudged and decreed that the judgment of the district court be affirmed with costs.

Grymes for the plaintiff, *Maybin* for the defendants.

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STERLING vs. FUSILIER.

The vendee is not bound to call his warrantor to defend him, when sued, but, if he does not, the latter may shew, when sued, that he had means of defence which would have proven successful, if he had been called on to defend the title.

STERLING vs. *FUSILIER.*

APPEAL from the court of the third district.

MATHEWS, J. delivered the opinion of the court. This case is submitted to us, without any argument, on the part of the appellee, the appellant having failed to appear, on the day appointed for its hearing.

The action is against the warrantor of the title to a slave, described in the plaintiff's petition, whom he bought from Martin L. Hannie, who sold as sole owner and warranted the title. The answer of the defendant denies any right of action, as set forth by the plaintiff, and also all the allegations in the petition.

The facts agreed upon by the parties, and the evidence spread on the record, fully establish all the material allegations in the petition, viz. that Hannie sold the slave to the plaintiff, that the defendant bound himself to warrant the title, and that the slave was taken from the purchaser by the judgment of a competent tribunal. At the time of the eviction, the vendor was dead, and his representative was called in to warrant and defend the title of his vendee.

Whether the defendant and appellant be con-

sidered as a surety or principal obligor, it is believed that he is responsible to the plaintiff and appellee, in damages. It is true, that he was not called to defend the title, according to his contract, in an action of warranty, nor in the action by which the defendant lost the slave. As surety, it is doubtful whether the latter was bound to call him in warranty; because the vendor is rather to be supposed to know the means of defence than his surety; *Pothier, Contrat de Vente*, n. 111: but, admitting that he was entitled to all the priviledges of a vendor, the neglect of the vendee, in failing to call him in to defend the suit, has no other effect than to cause the warranty to cease on proof, in the present suit that the warrantor had sufficient grounds or means of defence, to have obtained a judgment in his favor, of which he could not avail himself for want of having been called on. *Civ. Code*, 365, *art.* 64. This species of defence has neither been pleaded nor proven: nor was the exception of the discussion of the property of the principal debtor used as a defence, admitting that the defendant is in the situation of a surety, which would have been useless, as it is agreed that the vendor was insolvent.

It is, therefore, ordered, adjudged and de-

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creed that the judgment of the district court be affirmed with costs.

Turner for the plaintiff. *Duncan* for the defendant.

LLOYD & AL. vs. *MARTIN.*

A surety, in a custom-house bond, is bound to reimburse his part, to the co-surety, who has paid the whole amount, although the goods were delivered and sold by the latter.

APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court. This is an action to compel the defendant to refund to the plaintiffs one half of the amount of a custom house bond, in which he was bound with them as surety for M'Masters & co. who failed to pay it, when it became due, and who have since become insolvent. The plaintiffs, having paidt he whole, now claim one half thereof from the defendant, their co-surety.

Their right to recover is contested on the ground of the United States having a lien on the cargo, th duties on which were secured by the bond, which was put, by the principal obligor, in the possession of the plaintiffs. No objection is made to their right of action.

There cannot be any doubt that when bonds are given to secure the payment of duties on

merchandize, in conformity with the laws of the United States, the importer is at liberty to dispose of it, as he pleases, and there exists no lien on it, in the hands of a *bona fide* third possessor, in his own right.

In the present case, it appears from the testimony, that the cargo was placed in the hands of the plaintiffs and appellees, to secure them for advances which they had made to M'Masters & co. and not as a security for the payment of the custom house bond: a great proportion of it has been sold and the proceeds applied to the discharge of these advances.

This contract is presumed to have taken place before the failure of the persons for whom the parties to the suit are sureties, and the fairness of the transaction is not to be questioned. Whether they would have a right to retain the part of the goods which still remains in their possession, in kind, against a priviledged creditor of the insolvents, may be questioned. But the defendant and appellant cannot be considered as a creditor till he shall have paid his part of the bond, in which he is a co-surety with the plaintiffs. What priviledge he may then acquire by subrogation to the right of the United States, it is needless now to inquire.

We are of opinion, that the plaintiffs and ap-

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pellees having paid the whole amount of the bond, for the principal debtors, who are insolvent, have an equitable right to be reimbursed by their co-surety, the sum for which he became responsible.

It is, therefore, ordered, adjudged and decreed that the judgment of the district court be affirmed with costs.

Grymes for the plaintiffs, *Duncan* for the defendant.

DENIS vs. *BAYON.*

If the judgment appealed from contain none of the reasons on which it is grounded, it will be reversed, and if the record contain not the evidence the cause will be sent back.

APPEAL from the court of the second district.

MATHEWS, J. delivered the opinion of the court. This is a case in which there is no statement of facts, bill of exceptions, special verdict, or a certificate that the record contains all the evidence on which it was decided, in the district court.

The want of reasons in support of the judgment is assigned as error, and as none appear to have been given, as required by the 12th section of the 4th article of the constitution we are bound to reverse the judgment.

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It is, therefore, ordered, adjudged and decreed that the judgment be annulled, avoided and reversed; and, as there is not sufficient matter found in the record on which judgment might here be rendered, it is ordered that the cause be remanded, with directions to the judge to give judgment therein according to the said article of the constitution.

The plaintiff *in propriâ personâ*, *Livermore* for the defendant.

THE STATE vs. *MONTEGUT & AL.*

On a notice that an order will be moved for, that a treasury execution be put in force, the court cannot give judgment for the state, for the amount of the sum, in the execution.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. On the 19th of November last, a treasury execution issued, directed to the sheriff of St. John the Baptist, of which the defendant Montegut is sheriff, and the other defendants, his sureties, for the taxes of the preceding year, not accounted for. There being no coroner in that parish, the treasurer wrote to the attorney general, desiring him, in pursuance of the twenty-first section of the act supplementary to the several acts relative to the revenue of the state, to use every exertion for the recovery of the sum due.

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The attorney general addressed a letter to Montegut, on the 15th of the same month, giving him notice, that on the 29th he should make a motion in the court of the district, to put in force the execution, issued by the treasurer. A copy of this letter was served on all the defendants, and on the 29th, on the attorney general's motion, the district court gave judgment against all the defendants for the arrearages of taxes mentioned in the execution. The defendants appealed.

The attorney general attended, and prayed this court not to notice the appeal, as in his opinion the state was not suable by any of her citizens: none of whom, he said, could bring her into court, even by appeal.

He also desired the court to take notice that the citation of appeal had been served on him alone: while it could not be served on an attorney, unless the principal was out of the state.

The defendants contended that the district court had erred in giving judgment for the state, as no notice had been served on them that any judgment would be moved for.

We are of opinion that the constitution and the law having provided that the jurisdiction

of this court should extend to all civil cases, where the matter in dispute exceeds the sum of three hundred dollars, civil cases, in which the state is a party, are necessarily included; as neither the constitution nor the law have made any distinction, the court cannot make any. *Ubi lex non distinguit, nec nos distinguere debemus.*

The attorney general, the only person authorized to act in suits in which the state is interested, having been served with the citation of appeal, having attended in this court and prayed a dismissal, without pleading what he now calls an illegal or insufficient service in abatement, this court is bound to proceed to the examination of the case on its merits.

The district court has not given any of the reasons on which its judgment is grounded; but the judge has certified that the record contains all the evidence on which the cause was tried.

It is true the law authorizes the attorney general to obtain judgment on motion, or to proceed in any other summary manner, after giving to the party ten days notice. He saw fit, in the present case, to inform the defendants that he would make a motion to the dis-

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trict court to put the treasurer's execution in force. On this, we see not that it was either necessary or proper for the defendants to appear. The execution could not acquire any additional strength by the order of the district court that it should be put in force. If it did, they might as well remain quiet at home, if they had no valid reason to oppose to the motion. But, a notice of a motion for an order to put a treasury execution in force, does not appear to us sufficient to authorise the court to pronounce a judgment, for the sum mentioned therein, with interests and costs. The execution did not carry interest, and under it the money could be raised by the sale of the property of the debtor and his sureties only. Under the judgment, their bodies are rendered liable to imprisonment.

We are of opinion that the district court erred in giving judgment for the state on this notice, at all events in failing to adduce the reasons on which its judgment is grounded.

It is, therefore, ordered, adjudged and decreed that it be annulled, avoided and reversed.

Proceeding to inquire what judgment ought

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to have been rendered by the district court, it appears to us that it could not grant any other against the defendants than that which they had been informed would be moved for, viz. that the execution be put in force. We are not aware of any law that authorizes, or would render available, the interference of the district court in this respect.

It is true the attorney general is authorized to proceed in any other summary way; but this summary way, alluded to in the act, must be a legal one; unless summary and arbitrary be synonimous expressions, which we cannot admit.

The only judgment we can render is, that the attorney general take nothing by his motion.

Robertson, attorney general for the state, *Seghers* for the defendants.

WIKOFF vs. *TOWNSEND & AL.*

APPEAL from the court of the first district.

If the vendor points out a vacant lot for sale, telling the vendee it has 200 feet in front, and it turns out that

DERBIGNY, J. delivered the opinion of the court. The defendants withhold the price of a lot of ground, purchased by them from the plaintiff,

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alledging they were led into an error by his agent, as to its extent.

It appears that this agent accompanied one of the defendants on the premises, and there shewed him a vacant space, which he represented as the ground which was for sale, telling him it measured two hundred feet on Bienville street, and one hundred and twenty on Rampart street; that he gave this defendant to understand, as the latter thought, that the lot extended over the whole of the vacant space, up to the next inclosure, and it turns out that twenty feet front, on Bienville street, of that ground are the property of another person.

space shewn consists in the lot, and a space of thirty feet in front belonging to another, the error of the vendee, who believes that the two hundred feet include the thirty, does not vitiate the contract.

The defendants do not complain that they were not put in possession of a lot of two hundred feet on Bienville street; but they say that they were shewn a place said to measure two hundred feet, while it incloses two hundred and thirty, and that, as they were induced by this misrepresentation to purchase, the sale ought to be rescinded.

We do not think that this is an error which vitiates the contract. The defendants understood they were purchasing a space of two hundred feet in front: they knew, or at least must be supposed to have known, what extent that was. If they wanted to satisfy themselves on

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that score, they might have had it measured: but, if relying on their own judgment they made any mistake, as to the real extent of the two hundred feet, they cannot plead such a mistake as an excuse.

It is, therefore, ordered, adjudged and decreed that the judgment of the district court be affirmed with costs.

Livermore for the plaintiff, *Smith* for the defendants.

TAPPAN & AL. vs. *BRIERLY.*

If two persons jointly ship a cargo, and the consignee sell it and credit each for his share, his demand is subject to the attachment of his private creditors.

After the general issue pleaded, the defendant cannot shew that the property attached is not his.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The defendant is sued by attachment on two promissory notes. The process was levied on property of his, in the hands of W. Boyd & son, who being interrogated as garnishees, answered that they were the consignees of a cargo shipped to New Orleans by the defendant and the firm of N. A. & Jno. Haven, and that there remained in their hands a balance of $584,97 due to the defendant, and an equal one to the other shippers.

There was an attorney appointed to attend

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to the interests of the defendant, and he pleaded the general issue.

The plaintiffs having introduced W. Boyd, one of the garnishees, to prove the defendant's signature, the counsel of the latter inquired of him, on what ground he had asserted in his answers to the interrogatories, that the defendant was owner of part of the cargo there mentioned, and was answered from a knowledge derived from the defendant's letter, and information from the captain. The question was excepted to and the exception overruled.

The district court was of opinion that the property attached, being partnership property, was not liable to the attachment of the defendant's private creditors, and dismissed the appeal. The plaintiffs appealed.

It appears to this court that the answer was irrelevant. The defendant had pleaded the general issue, and it was too late to complain of an irregularity in the execution of the process of attachment; but this does not affect the case; laying it aside, we find the interest of the defendant, in the property attached in the hands of the garnishees, sufficiently described in the hands of the garnishees.

There is not any evidence of an existing

partnership between the defendant and the other joint owners of the cargo. The joint ownership was at an end, with the transaction in which the interests of the joint owners were united. By the accounts, referred to as part of the answer to the interrogatories, and which are the only evidence of the defendant's property in the hands of the garnishees, it appears that he is entitled to $584,97, for one half of the cargo, and stands credited with that sum by the garnishees. This severed demand of his is clearly attachable for his debt.

We do not mean to intimate whether partnership property, viz. the share of a partner in it, cannot be seized by his private creditors, as the district court thinks: the solution of this question being unnecessary in the present case.

It is, therefore, ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed; and it is ordered, adjudged and decreed that the plaintiffs recover from the defendant the sum of five hundred and fifty-one dollars and seventy-nine cents, with interest at five per cent. from the inception of the suit, and that the garnishees pay the said sum out of the clear funds in their hands, or the balance which they acknowledge

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to the credit of the defendant in their books, and that the defendant pay costs in both courts.

Pierce for the plaintiffs, *Carleton* for the defendant.